IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 467

AYRSHIRE COLLIERIES CORPORATION, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

BRIEF FOR AYRSHIRE COLLIERIES CORPORATION, ET AL., APPELLANTS.

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OPINIONS BELOW.

No opinion was rendered by the District Court. The findings of fact and conclusions of law (R. 108-111) have not been reported.

The report of the Interstate Commerce Commission (R. 164-221) in the case entitled "I. & S. Docket No. 5139,

Coal to Beloit, Wis., and Northern Illinois," is reported in 263 I. C. C. Reports, pages 179-226.

STATEMENT OF JURISDICTION.

The final decree of the District Court was entered June 5, 1946. (R. 111.) Petition for appeal was filed July 30, 1946, and allowed August 1, 1946. (R. 112, 119.) The jurisdiction of this Court rests upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47a) and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted by this Court on October 21, 1946. (R. 1675.)

STATUTES INVOLVED.

The pertinent provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47) and Sections 2, 3 (1), 13 (1), 13 (4), 15 (1) and 15 (7) of the Interstate Commerce Act (U. S. C., Title 49, Secs. 2, 3 (1), 13 (4), 15 (1) and 15 (7)) are printed in the Appendix (*infra*, pp. 95-100).

STATEMENT OF THE CASE.

This is an appeal from the final decree of the specially constituted District Court for the Southern District of Indiana, entered June 5, 1946, dismissing appellants' petitions to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission, entered July 9, 1945, in a proceeding before the Interstate Commerce Commission entitled "I. & S. Docket No. 5139, Coal to Beloit, Wis., and Northern Illinois."

The order of the Interstate Commerce Commission (hereinafter throughout this brief referred to as the "Commission") required the railroad carriers to cancel certain new rates on bituminous coal from mines in Indiana, Illinois and western Kentucky to destinations in northern Illinois and Beloit, Wisconsin, which were published in tariff schedules filed to become effective on or about August 2, 1942, which schedules were suspended by the Commission by its order of investigation and suspension entered July 30, 1942. (R. 141-144.)

The order of July 9, 1945, further required the respondent carriers, "according as they participate in the transportation, * * * (1) to cease and desist from practicing the unjust discrimination under Section 2 of the Interstate Commerce Act and the undue prejudice and preference under Section 3 (1) of the Act, found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove the said unjust discrimination and undue prejudice and preference," in the rates for the transportation of bituminous coal from mines in Indiana to Rockford and other destinations in northern

Illinois. (R. 222.) It is this part of the order which appellants, Ayrshire Collieries Corporation, *et al.*, seek to have enjoined and set aside.

The I. & S. Docket No. 5139 proceeding was initiated by a complaint (R. 131) filed with the Commission on July 16, 1942, by the Coal Trade Association of Indiana on behalf of its members, appellants in the case of *Ayrshire Collieries Corporation, et al.* v. *United States*, seeking suspension of and investigation into the lawfulness of certain new rates published to become effective August 2, 1942, and later, for the transportation of coal from mines in Indiana to Beloit, Wisconsin, and to Rockford, Illinois, and some seventy other destinations in northern Illinois in the vicinity of Rockford. All rates published by each of the carriers serving mines in Indiana were increased by the same amounts to the same destinations in northern Illinois. No new rates to Beloit, Wisconsin, were published by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter called the "Milwaukee," via its direct lines, or by the Southern Railway Company, hereinafter called the "Southern", from mines on its lines or from mines on the lines of the Algers, Winslow & Western Railroad, hereinafter referred to as the "A. W. & W.," with which the Southern connects. (R. 1645-1651, 1658-1661.)

The Commission on July 30, 1942, entered an order which recited the filing of schedules of new rates; enumerated the supplements to the tariffs containing such schedules; ordered that "the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said Schedules contained in said tariffs"; and suspended the operation of the schedules contained in such tariffs. (R. 141-144.)

Subsequent to the said order of July 30, 1942, carriers serving mines in Illinois filed a complaint (R. 145-159) with the Commission under Section 13 of the Interstate Commerce Act alleging that the rates on coal moving in intrastate commerce within Illinois were unduly preferential and prejudicial as between persons and localities in intrastate and interstate commerce and unjustly discriminatory against interstate commerce. This proceeding was entitled "Bituminous Coal Rates Within Illinois, Docket No. 28881." (R. 159-161.)

Hearings in I. & S. Docket No. 5139 and Docket No. 28881 and two cases pending before the Illinois Commerce Commission were held before an Examiner of the Commission and representatives of the Illinois Commerce Commission upon a common record. Thereafter on July 9, 1945, the Commission filed its report covering both said proceedings and entered its order in I. & S. Docket No. 5139. (R. 164-221, 222.)

Appellants filed a petition with the Commission to reopen, rehear and reconsider said report and order in I. & S. Docket No. 5139, which petition was denied by the Commission by order entered November 13, 1945. (R. 223.)

History and Background of Commission Proceeding.

The various coal origin groups or districts referred to in the report of the Commission and in the evidence are the result of the general, but not universal, practice of the railroads serving mines in the same vicinity publishing the same rates from those mines to a particular destination. There are five such groups in Indiana, four of which are important and are referred to herein, eight in Illinois and one in western Kentucky. (R. 1066-1068.)

The differences in the predominant rates from origin groups to destination are referred to as "differentials",

where the same difference applies to destinations generally. As between the Indiana groups, the same differentials apply to all destinations in Iowa, Minnesota and Wisconsin. For example, from the Linton-Sullivan group the rates are 10 cents per ton more than those from the Brazil-Clinton group, the rates from the Princeton-Ayrshire group are 7 cents per ton more than from the Linton-Sullivan group, and the rates from the Boonville group are 3 cents per ton more than from the Princeton-Ayrshire group. (R. 1068.) In the report of the Commission and hereinafter the Brazil-Clinton, Linton-Sullivan and Princeton-Ayrshire groups are referred to as the Brazil, Linton and Princeton groups, respectively.

To all destinations in northeastern Iowa, southeastern Minnesota and Wisconsin, except a narrow strip along Lake Michigan, the rates from the Brazil group are 30 cents per ton less than the rates from the Southern Illinois group, and are the same as the rates from the Springfield, Illinois, group. Prior to 1930, the same relationship with the Illinois groups existed at destinations in northern Illinois. (R. 1069-1070.)

In 1930, the intrastate rates from the Illinois groups to Rockford, Freeport, Dixon, Chicago and certain other points in Illinois were reduced under orders of the Illinois Commerce Commission. The reduction to Rockford amounted to 17 cents per ton. No reduction was made in any of the rates from the Indiana groups to any of those destinations. (R. 1070; Exhibit No. 4, Sec. I, p. 9; R. 1676.) The Commission, in *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, ordered the Illinois intrastate rates (except the rates to Rockford, Freeport and Dixon, and certain intermediate points) restored to their former level.

The Milwaukee, which serves only mines in the Brazil

and Linton groups in Indiana, and reaches Rockford and Freeport by its own lines, immediately after the decision of the Commission in *Intrastate Rates on Bituminous in Illinois,* 182 I. C. C. 537, filed tariffs reducing, by the same amount the Illinois intrastate rates had been reduced, the rates from mines served by it in Indiana to Rockford, Freeport and other destinations on its line intermediate to Rockford. These reduced rates applied only via the Milwaukee single-line route from mines to destinations. The Commission suspended the rates of the Milwaukee, and, after hearing, filed its report and order requiring that such rates be cancelled. *Coal From Indiana to Illinois,* 197 I. C. C. 245; 200 I. C. C. 609.

On petition of the Milwaukee, filed in the United States District Court for the Northern District of Illinois, the order of the Commission was permanently enjoined, *Chicago, Milwaukee, St. P. & P. R. Co.* v. *United States,* 8 Fed. Supp. 970. On appeal, this Court affirmed the decree of the District Court, *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1934), 294 U. S. 499.

The Commission, in the case of *Fairbanks-Morse & Co.* v. *Alton & Southern R.,* 251 I. C. C. 181, decided March 3, 1942, entered an order requiring rates on coal from Illinois, Indiana and western Kentucky to Beloit, Wisconsin, not to exceed the rates from the same origins to Rockford by more than 15 cents per ton. The new rates involved in I. & S. Docket No. 5139 were filed in a purported effort by the carriers to comply with said order. (R. 277-278.)

Contemporaneously with the filing by carriers serving Indiana of the tariffs to become effective August 2, 1942, which tariffs are the subject of the suspension proceeding I. & S. Docket No. 5139, the carriers serving coal mines in Illinois filed with the Illinois Commerce Commission tariffs which increased rates from such mines to Rockford and the same destinations in northern Illinois to which the interstate rates from Indiana had been increased. The amounts

of the increases from the mines in Illinois to these destinations were generally the same as those from the mines in Indiana, although to many of the destinations the increases from the Illinois mines were less than from the Indiana mines. (R. 1076-1077.)

At the time of the entry of the order in the *Fairbanks-Morse & Co.* case, the rates on coal from all origins in Illinois to Beloit were 30 cents per ton more than the rates from the same origins to Rockford. The rates from the Indiana mines to Beloit were 30 cents per ton higher than the rates to Rockford via the direct line of the Milwaukee from mines served by it; via other carriers serving Indiana the rates to Beloit were in some instances 18 cents and others 13 cents per ton higher than the rates to Rockford. (Ex. No. 4; R. 1676.)

The new and suspended tariffs of all carriers serving Illinois, Indiana and western Kentucky increased the rates to Rockford by 15 cents per ton. (R. 257.) The carriers serving Illinois and western Kentucky mines did not publish new rates to Beloit. The Milwaukee did not publish new rates to Beloit via its line direct, which resulted in a difference between its new rates to Rockford and its present rates to Beloit of 15 cents per ton. The Southern did not publish new rates from the Princeton and Boonville groups to Beloit, which made its new rates published to Rockford 3 cents per ton under the continuing rates from mines on its line in the Princeton and Boonville districts to Beloit. The rates from mines on the A. W. & W. via the Southern to Rockford and Beloit are and would be the same as from mines in the Princeton group on the Southern. The other carriers serving Indiana mines published new rates to Beloit 15 cents per ton higher than their new rates to Rockford. (R. 1109-1112.)

The Origin Groups.

In each coal origin group are many points of origin. In the Brazil group are 25 origin points; 4 served by the Milwaukee, 10 by the Chicago & Eastern Illinois Railroad Company; 7 by the Pennsylvania Railroad Company; 3 by the New York Central Railroad Company; and 5 by the Baltimore & Ohio Railroad Company. One point is served by two carriers, and one point, Terre Haute, by four carriers. Carriers do not publish rates from all the origins served by them to all destinations; for example, rates are published from 13 origins in the Brazil group to Amboy, Illinois, and from all 25 origins to Belvidere, Illinois. (Ex. No. 28, page 13; R. 1686.)

The rates are not always uniform from all origins in a group to the same destination; for example, there are 29 origins in the Princeton group, and to Belvidere, Illinois, from 20 of the origins the rate is $2.09 per ton, from the 7 origins on the A. W. & W. the rate is $2.22 per ton and from the 2 origins on the B. & O. the rate is $2.14 per ton, while to DeKalb, Illinois, the rates are the same from all origins. Of the 29 origins in the Princeton group 6 are served by the Southern, 16 by the New York Central, 1 by the C. & E. I., 2 by the B. & O., and 7 by the A. W. & W. Three of the 29 origins are served by two carriers. (Ex. No. 28, pp. 1 and 2; R. 1686.)

There are 27 origins in the Linton group, 9 of which are served by the Milwaukee, 3 by the Pennsylvania, 5 by the C. I. & L. (The Monon), 5 by the New York Central, 5 by the C. & E. I., and 4 by the Illinois Central. Two origins are served by two carriers and one is served by three carriers. (Ex. No. 28, p. 7; R. 1686.)

All origins in the Boonville group are served by the Southern Railway. (Ex. No. 28, p. 1; R. 1686.)

Distances and Rates.

The distances from the various origins in a group to a destination differ considerably. For example, from the Brazil group, via the direct line of the Milwaukee to Rockford, the distance varies from 228 miles to 256 miles, while from origins on the Pennsylvania the distance varies from 258 to 283 miles. The average distance from all origins in the group to Rockford is 251 miles, and from Milwaukee origins 237 miles. (Ex. No. 28, p. 15; R. 1686.) These distances are via the shortest tariff route from each origin, which means that if two or more carriers serve one origin point the distance via the route of the carrier having the shortest route is used, and where an origin is served by one carrier the distance via the shortest route of that carrier is used. (R. 897-898.)

Coal does not necessarily move via these routes; for example, from origins in the Brazil group on the Pennsylvania no coal moves over the routes distances for which are shown in Exhibit No. 28. Coal from those origins consigned to Rockford would be hauled to Chicago by the Pennsylvania and there turned over to another carrier for movement to Rockford, a distance of 387 miles, not the distances of 258 to 283 miles shown in the exhibit. From origins in the Linton group served by the Pennsylvania the distance to Rockford via the route of movement via Chicago, is 415 miles, not the distances of 283 to 306 miles shown in Exhibit No. 28, at page 9. (R. 1489-1490.)

To destinations in northern Illinois on its own line the rates of the Milwaukee from origins on its line in the Brazil group are from 4 to 17 cents less than the rates published by other carriers serving origins in that group. To DeKalb, the Milwaukee rate was $1.80 for distances of 191, 193, 197 and 219 miles, while via other carriers the rate was $1.84 for distances ranging from 197 to 246 miles.

To Byron, the rate of the Milwaukee was $1.80 for hauls of 225, 227, 232 and 254 miles; via the other carriers, except the Pennsylvania, the rate was $1.90 for distances ranging from 231 to 292 miles; via the Pennsylvania the rate was $1.97 for distances of 231 to 281 miles, but for actual hauls much longer. (Ex. No. 28, p. 14; R. 1490, 1686.)

The foregoing are typical of the rates and distances from the various origins served by the Milwaukee to destinations on its line in Illinois and the rates and distances of other carriers serving origins in the same group.

The situation with respect to the Illinois groups to the same destinations is the same as that in Indiana, that is, distances from origins in a group on one carrier vary from origins in the same group on another carrier. To some destinations the rates are published from all origins in a group and are the same; to some destinations, rates are published from some origins and not from others; and to some destinations one or two of a number of carriers serving origins in a group publish higher or lower rates than a majority of the carriers. (Ex. No. 27; R. 1685.)

The various exhibits of the carriers and the Indiana coal operators showing average distances from the origin groups show the average of all short tariff route distances via each railroad and all origins in a group served by such railroad. The exhibits of the Illinois coal operators show the distances via the shortest tariff route from each origin point in a group, eliminating the short tariff routes of those carriers serving an origin which are longer than the shortest route of any of the carriers serving such origin. The Commission adopted the method of computing distances used by the Illinois operators. (Report of Commission, 263 I. C. C. at page 187; R. 174.) Exhibits Nos. 27 and 28 above referred to use that method. (R. 895.)

The evidence showed the average distance from all origins in each group to each of twelve destinations selected

by the carriers and Illinois coal operators as typical or representative destinations in northern Illinois. Exhibit No. 27 (R. 1685) shows the distances from each origin in each of six of the origin groups in Illinois, the rate and the average distances from said groups to each of said twelve destinations; the average distance and a so-called average rate from each of the eight groups in Illinois to each of the twelve destinations, and the average distance and a so-called average rate from all Illinois groups to all of the twelve destinations. Exhibit No. 28 shows the same data for the Indiana groups to the same twelve destinations. (R. 1686.)

In Appendix A to the report of the Commission, 263 I. C. C. 220-223, are shown the average distance, the present rate, the proposed (suspended) rate, the rate approved in I. & S. Docket No. 4368 and the rate approved in this proceeding to each of the said twelve destinations in northern Illinois and Beloit, Wisconsin. (R. 213-217.) The distances shown are those appearing in Exhibits Nos. 27 and 28 (R. 1685-1686), except that some of the distances, for example to Polo, Rockford, and Beloit, are not as shown in said exhibits. The Commission shows the distance from the Belleville group to Beloit as 358 miles; Exhibit No. 27 shows the distance to be 380 miles. The Commission shows the distance from Centralia as 283 miles; Exhibit No. 27 shows the distance as 331 miles. To Rockford, the Commission shows the distance from Belleville as 332 miles, in Exhibit No. 27 it is shown as 339 miles; and from the Linton group in Indiana the Commission shows the distance to Rockford as 300 miles, while Exhibit No. 28 shows it as 292 miles.

In Appendix D to its report, 263 I. C. C. 226, the Commission sets forth the average distances and the average rates, present and proposed, from each group in Indiana and Illinois to all the twelve so-called representative des-

tinations in Illinois, which distances and average rates appear in Exhibits Nos. 27 and 28. In the same appendix are shown averages of the rates approved by the Commission from each group to all of said twelve destinations, and the percent such averages of approved rates are of each of two distance scales prescribed by the Commission in other cases. (R. 220.)

Transportation and Operating Conditions and Circumstances.

The conditions under which the Milwaukee transports coal from mines on its line to Rockford and other destinations on its line in northern Illinois are favorable. The smallest engine used from concentration yards in the Brazil group handles trains of 5800 gross tons to Hallock and 6400 gross tons to Faithorn; either the large or smaller type engines will handle trains of 90 to 95 cars of mixed loads and empties, as the grades do not affect the operation. (R. 780.) There is no passenger service on the line from Indiana to Chicago. From Bensenville (the Chicago freight yard) the Milwaukee handles trains of 3350 to 4500 gross tons to Savanna, Illinois, depending on the type of engine used, and that line is double track main line for high speed. The Terre Haute division has an adequate amount of double track for good operation. (R. 781.) Solid train loads of coal move from the Indiana fields, but the Milwaukee tries to operate so as to pick up other cars at interchange points between the coal fields and Faithorn, its northern terminal near Chicago. Indiana and Illinois coal destined to Rockford moves through Davis Junction and trains on that line handle 5000 gross tons. (R. 782.) Most coal from Illinois origins for destinations on the Milwaukee is received by the Milwaukee at Mendota, Illinois, and from Mendota to Davis Junction an engine

handles 3000 gross tons. The same engine in the Indiana territory handles 4500 gross tons to Bensenville, the Chicago yard. (R. 785.)

The Milwaukee receives coal from other carriers serving Indiana coal mines at junctions in Indiana, but none from the Pennsylvania. (R. 791.)

The location of grades is important in their bearing on operating conditions; the momentum of the train approaching the grade is important; the comparison of a .5 per cent grade on one railroad with a .5 per cent grade on another is meaningless, unless you know the location of each grade and the tonnage actually handled over such grades. (R. 792.) Grades in the lines from the assembly yards to the mines do not affect the operations on the Milwaukee. (R. 797.) The line of the Milwaukee from Terre Haute to Bensenville yard is exceptionally straight. The operating conditions from Terre Haute to Chicago are better than from Chicago to Savanna. (R. 799.)

There are coal mines on the C. & E. I. in the Brazil and Princeton groups in Indiana. There are also mines on the C. & E. I. in the Linton group, but none of them are operating. Exhibit No. 18 shows distances from loading (origin) points on the C. & E. I. to Chicago from all groups which it serves and the amount of double track. (R. 803.) Exhibit No. 19 shows distances to Chicago, miles of single and double track, number of break-up points, maximum grades and curves and ratings on engines used. (R. 804.) The witness was unable to make any comparison of the operating conditions on the Milwaukee and the C. & E. I. from origins served by those carriers. (R. 805.)

No evidence was offered respecting the operating conditions or circumstances affecting the transportation of coal from Indiana origins to northern Illinois via the Pennsylvania, New York Central, Monon (C. & I. L.), B. & O., Illi-

nois Central, Southern, A. W. & W. or Indiana railroads, other than the distances from origin points on such lines via short and shortest tariff routes.

Production and Movement of Coal.

The amount of coal transported from Indiana via any railroad to any destination was not shown, except the percentage of coal handled by the Milwaukee to Rockford was stated for "a recent period" as 95.4 per cent of the total from the Brazil group and 78.5 per cent of the total from the Linton group. (R. 525-526.)

Exhibit No. 4, Section VIII, in the Commission record shows the tonnages of coal moved from each of the origin groups in Illinois and Indiana to Beloit, Wisconsin, and DeKalb, Dixon, Freeport, Geneva, Rochelle, Rockford and Sterling, Illinois, destinations involved in this proceeding, for the first six months of 1941, the last six months of 1941 and the first six months of 1942, and also shows the movement of coal to three destinations in Wisconsin. This exhibit shows that in each period the Southern Illinois group shipped more coal to each of the destinations than all the balance of Illinois and Indiana combined. (R. 236, 1677.)

Exhibit No. 99 of the Commission record compares the shipments from all Illinois mines and all Indiana mines to the seven destinations in Illinois and Beloit, Wisconsin, shown in Exhibit No. 4, Section VIII. That exhibit shows that the Illinois groups shipped 546,822 tons to the Illinois points in 1936 and 568,872 tons in 1941, and that Indiana groups shipped 121,368 tons to the seven Illinois points in 1936 and 268,707 tons in 1941. It shows that to Rockford the shipments from Indiana increased from 51,347 tons in 1936 to 211,561 tons in 1941. Omitting Rockford, Indiana in 1936 shipped 70,021 tons of coal to the other six

Illinois points. In 1941, to those six points, Indiana shipped 57,146 tons, approximately 13,000 tons less than in 1936, a loss of 18 per cent in its tonnage. Excluding Rockford, the Illinois groups shipped 338,793 tons to the six Illinois destinations in 1936 and 292,771 tons in 1941, a loss of 46,000 tons, or 13 per cent less. (R. 1504, 1697.).

Exhibit No. 100 shows the shipment of coal from all groups in Illinois and Indiana as a whole and from each of the groups to all destinations in Indiana, except the Chicago Switching District, during the years from 1923 to 1941, inclusive. (R. 1506, 1697.)

Exhibit No. 101 of the Commission record shows shipments from Illinois, Indiana and western Kentucky groups to all destinations, except destinations in Indiana, for the years 1923 to 1941, inclusive. The exhibit shows the same data to all destinations in Illinois, other than the Chicago Switching District and East St. Louis, for the years 1923 to 1941, inclusive. Similar information is shown regarding the Chicago Switching District as such. The exhibit shows that total shipments from Illinois to all destinations declined from 48,401,000 tons in 1923 to 29,768,000 tons in 1941, whereas Indiana shipment to all destinations declined from 14,549,000 tons in 1923 to 12,498,000 tons in 1941. (R. 1507-1510, 1697.)

The exhibit further shows that in 1932 there was a decided increase in the tonnage shipped from the Princeton group in Indiana to all destinations and a decided reduction in the tonnage shipped from the Boonville group in Indiana. Further evidence of record shows that in 1930 or 1931 the New York Central Railroad for the first time published from mines that had theretofore taken the Boonville rates, the rates applicable from the Princeton group, and those mines were thereafter treated as a part of the Princeton group, leaving only a few mines on the Southern Railway in the Boonville group.

Exhibit No. 101 also shows that Boonville and Princeton shipped 3,460,000 tons in 1931 and 3,784,000 tons in 1932, which was not as large an increase in 1932 as the whole State or the Brazil group enjoyed. Illinois, particularly Southern Illinois, has lost tonnage in Iowa, Wisconsin and other territories north and west of Illinois, which has made the northern Illinois market more important than it was in 1923.

The Princeton and Boonville Groups.

The Princeton district in Indiana is served by five carriers. The Boonville district in Indiana is served only by the Southern Railway, which also serves mines in the Princeton group. The mines in the Boonville group are all small mines, with one exception. The one large mine in the Boonville group is about ten miles from a large mine in the Princeton group, located on the New York Central. The difference in distance from mines on the Southern Railway in the Princeton group to Rockford, Illinois, for example, and mines on the Southern Railway in the Boonville group to Rockford is 49 miles. The distance from all mines on the New York Central Railroad in the Princeton group to Rockford is 51 miles shorter than from all mines on the Southern in Boonville to Rockford. (Ex. No. 41; R. 1063, 1688.) (See also Ex. No. 28; R. 898, 1686.) To Freeport, however, while the distance from the mines on the Southern in the Princeton group is 49 miles shorter than from the Boonville group on the Southern, the distance from the mines on the New York Central in the Princeton group is 2 miles greater than the distance from the Boonville mines.

The mines in the Boonville group are served by a branch of the Southern Railway, extending from Huntingburg, Indiana, to Evansville, Indiana. Mines on the Southern

in the Princeton group are on the main line running from Louisville, Kentucky, through Huntingburg to St. Louis, Missouri. (R. 826.) Coal from Boonville is moved to Huntingburg, thence over the main line to the connections of the Southern with carriers serving northern Illinois and Wisconsin. The haul from the Boonville mines would be shorter if the coal moved via Evansville, Indiana. (R. 835.) Operating conditions make the haul through Huntingburg preferable to the Southern Railway. (R. 840-841.)

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in holding that two members of a statutory three-judge District Court, convened under the provisions of U. S. Code, Title 28, Section 47, may determine a case pending before such Court when the third member of the Court is unable to and does not participate in such determination. (Assigned as Error No. 1.) (R. 114.)

2. The Court below erred in not holding that the conclusion of the Commission that the existing rates from mines in Indiana to destinations in northern Illinois result in unjust discrimination, as between shippers of coal transported in whole or in part by the Milwaukee or Illinois Central railroads, in violation of Section 2 of the Act, and in undue preference and prejudice, as between the origins in the Brazil and Linton districts and as between the respective Indiana districts, in violation of Section 3 (1) of the Act, and the order of the Commission to remove such alleged violations are not supported by findings of fact in the report of the Commission or by substantial evidence in the record before the Commission. (Assigned as Error No. 19.) (R. 117.)

3. The Court below erred in not holding that there is no evidence in the record before the Commission from which comparisons can be made of the circumstances and conditions of the transportation service involved in the transportation of coal from mines in the Brazil and Linton groups in Indiana to destinations in northern Illinois via the single-line of the Milwaukee, with the circumstances and conditions of the transportation service involved in the transportation of coal from mines on other railroads

in those groups via joint-line routes from such mines to said destinations. (Assigned as Error No. 5.) (R. 115.)

4. The Court below erred in not holding that there is no evidence in the record before the Commission and no findings of fact in the report of the Commission that, but for the lower single-line rates of the Milwaukee, shipments of coal would have moved from mines on other railroads in the Brazil and Linton groups, or any other groups in Indiana, to Rockford and other destinations in northern Illinois to which the Milwaukee maintains lower rates via its single-line than the joint-line rates maintained by other carriers serving origins in said groups. (Assigned as Error No. 6.) (R. 115.)

5. The Court below erred in not holding that there is no evidence in the record before the Commission and no findings of fact in the report of the Commission that the rates published by the Milwaukee from origins on its line in the Brazil and Linton groups accorded shippers from such origins any undue preference or subjected any other shipper or mine in said groups, or any receiver of freight at a destination on the line of the Milwaukee, to any undue prejudice or disadvantage. (Assigned as Error No. 8.) (R. 115-116.)

6. The Court below erred in not holding that there is no evidence in the record before the Commission and no findings of fact in the report of the Commission that the Milwaukee effectively controls the rates to destinations in northern Illinois from the mines served by other carriers in any Indiana group. (Assigned as Error No. 7.) (R. 115.)

7. The Court below erred in not holding that the Commission entered no order for an investigation and hearing concerning the lawfulness of the existing rates on coal from mines in Indiana to Rockford or other destinations

in northern Illinois. (Assigned as Error No. 4.) (R. 115.)

8. The Court below erred in not holding that the Commission had no jurisdiction or authority in the I. & S. Docket No. 5139 proceeding to enter an order with respect to the relationship between the present rates of the Milwaukee, via its direct line from origins on its line in the Brazil and Linton groups to destinations on its line in Illinois, and the present rates of other carriers from other origins in said groups or other Indiana groups to the same destinations in Illinois. (Assigned as Error No. 17.) (R. 117.)

9. The Court below erred in not holding that the Commission had no jurisdiction or authority in the I. & S. Docket No. 5139 proceeding to enter an order with respect to the present rates from mines in Indiana to destinations in Illinois, except as such existing rates might be affected indirectly by an order of the Commission with regard to the suspended rates, and that the Commission, having ordered that such suspended rates be cancelled, was without jurisdiction or authority to enter any order in said proceeding respecting the present rates from the Indiana mines to destinations in Illinois. (Assigned as Error No. 18.) (R. 117.)

10. The Court below erred in not holding that the Southern Railway, having published no new rates from points of origin in Indiana to Beloit, Wisconsin, and the Milwaukee, having published no new rates from points of origin served by it in Indiana via its direct lines to Beloit, Wisconsin, the existing rates of said railroads were not in issue and the Commission had no jurisdiction or authority in the I. & S. Docket No. 5139 proceeding to make any findings with respect to said rates, or with respect to the relationship of the said rates and the proposed increased

rates of other carriers serving mines in Indiana, or to enter any order respecting the said rates of the Southern Railway and the Milwaukee from Indiana origins to Beloit, Wisconsin. (Assigned as Error No. 20.) (R. 117-118.)

11. The Court below erred in not holding that there is no evidence of record before the Commission and no findings of fact in the report of the Commission that the rates from the Boonville group in Indiana to any destination were unreasonable, or that the rates from the said Boonville group or the rates from the Princeton group to any destination, subjected the Boonville group to an unjust discrimination or unduly prejudiced the Boonville group or shippers therein or unduly preferred the Princeton group and the shippers therein. (Assigned as Error No. 10.) (R. 116.)

12. The Court below erred in not holding that the Commission had no authority in the I. & S. Docket No. 5139 proceeding, on the evidence of record in that proceeding, to make any finding that the rates from the Boonville group should be on the same level as the rates from the Princeton group to any destination involved. (Assigned as Error No. 22.) (R. 118.)

13. The Court below erred in not holding that the Commission had no authority to approve or prescribe rates or rate relationships from a number of origin groups to a number of individual destinations on the basis of the average of the rates from each group to all of the destinations, where such rates vary from destination to destination and the relationships of the rates from the different origin groups vary as between destinations. (Assigned as Error No. 23.) (R. 118.)

14. The Court below erred in not holding that the Milwaukee and the Southern Railway had the right to initiate and maintain such rates as those carriers deemed proper

until such time as the Commission found, in a proceeding instituted by an order of the Commission for an investigation and hearing concerning the lawfulness of such rates, and on the basis of substantial evidence, that such rates violated one or more provisions of the Interstate Commerce Act. (Assigned as Error No. 21.) (R. 118.)

15. The Court below erred in not holding that the report of the Commission contains no findings of fact to support the conclusion that the rates approved in said report to Rockford and specific destinations in northern Illinois are reasonable, non-discriminatory, non-prejudicial and non-preferential. (Assigned as Error No. 9.) (R. 116.)

16. The Court below erred in not holding that the report and order of the Commission of July 9, 1945, are unfair, arbitrary and discriminate against plaintiffs. (Assigned as Error No. 11.) (R. 116.)

17. The Court below erred in not entering a decree perpetually enjoining the order of the Commission of July 9, 1945, in so far as said order requires the carriers to change existing rates from mines in Indiana to destinations in Illinois and authorizes and permits the carriers serving mines in Indiana to establish rates on the basis of the rates approved by the Commission. (Assigned as Error No. 26.) (R. 119.)

18. The Court below erred in holding that the Commission's report and order entered July 9, 1945, were made within its statutory authority and are supported by adequate findings of fact. (Assigned as Error No. 12.) (R. 116.)

19. The Court below erred in holding and deciding that the findings of the Commission as set forth in the report and order of July 9, 1945, have substantial support in the record made before the Commission and afford a

rational basis for its conclusions. (Assigned as Error No. 13.) (R. 116.)

20. The Court below erred in holding that the plaintiffs were afforded a full and fair hearing before the Commission and the record made before the Commission discloses no error of law. (Assigned as Error No. 14.) (R. 116.)

21. The Court below erred in holding that the report and order of the Commission are lawful and valid in all respects. (Assigned as Error No. 15.) (R. 117.)

22. The Court below erred in dismissing the plaintiffs' complaints. (Assigned as Error No. 16.) (R. 117.)

SUMMARY OF ARGUMENT.

I.

Two members of a statutory three-judge District Court, convened under the provisions of U. S. Code, Title 28, Section 47, cannot determine a case pending before such Court when the third member of the Court is unable to and does not participate in such determination.

II.

That part of the order of the Commission requiring the carriers serving Indiana to cease and desist from practicing and to avoid and remove the unjust discrimination in violation of Section 2 of the Interstate Commerce Act found in the report to exist is not supported by findings of fact or by evidence. The evidence shows only that the Milwaukee publishes rates via its single line from origins served by it in the Brazil and Linton groups to Rockford and other destinations on its line in Illinois, which rates are lower than rates published by other carriers serving other origins in those groups in Rockford, and that in some of those other rates the Milwaukee participates as an intermediate or terminal carrier. There being no findings and no evidence of facts that constitute a violation of Section 2 of the Act, that part of the order of the Commission to cease and desist from such alleged violation should be enjoined.

III.

That part of the order of the Commission requiring the respondents to cease and desist from practicing the undue prejudice and preference in violation of Section 3 (1) of

the Act found in the report to exist, and to publish rates that will remove such undue prejudice and preference, is not supported by findings of fact or by evidence. There is no evidence and no finding of any facts with respect to the rates from the Indiana groups, as between themselves, to any Illinois destination that constitute a violation of Section 3 (1) of the Act. Therefore, that part of the order requiring a change in the present rates to remove the alleged undue prejudice and preference should be enjoined.

IV.

The Commission had no jurisdiction or authority in the proceeding, I. & S. Docket No. 5139, to enter any order to remove unjust discrimination or undue prejudice and preference in the present rates. The only issue before the Commission in that proceeding was the legality of the new rates which had been suspended by the order of the Commission of July 30, 1942. The Commission entered no order for an investigation and hearing respecting the lawfulness of and no hearing was entered into with respect to the legality of the present rates from Indiana. The order of the Commission of July 9, 1945, required the cancellation of the suspended rates. The order did not require the publication of any other rates in lieu of the cancelled rates; it merely stated that the order was "without prejudice to the establishment of rates on the bases approved in the said report," but did not require such publication. That part of the order that requires changes in the present rates is beyond the jurisdiction of the Commission. The conclusion of the District Court that plaintiffs were accorded a full and fair hearing before the Commission with respect to the present rates from Indiana to Illinois destinations is erroneous. The further conclusions of the District Court that the record made before the Commission discloses no error of law is likewise erroneous.

V.

The Commission had no authority or jurisdiction in the I. & S. Docket No. 5139 proceeding to approve or prescribe rates from the Boonville group on a parity with rates from the Princeton group to destinations in Illinois, or to enter any order requiring such a parity in the present rates. The matter was not involved in the hearing, and there is no evidence to sustain such order or such approved rates.

VI.

The Commission had no authority or jurisdiction to approve or prescribe specific rates or rate relationships from a number of origin groups to each of a number of widely separated destinations in northern Illinois, on the basis of the average of the rates and distances from each group to all the destinations, where the amounts of such rates vary and the relationships between the origin groups vary at the different destinations.

VII.

The Commission has no authority under the Act to require the Milwaukee to charge higher rates than it believes to be proper from origins served by it in the Brazil and Linton groups because other carriers serving other origins in those groups publish higher rates. Each carrier has the right to publish such rates as it deems proper so long as those rates do not violate some provision of the Act.

VIII.

The order of the Commission is arbitrary and capricious because it is not supported by adequate and suitable findings of fact or by evidence, and also because the facts found and stated in the report afford no rational basis for the conclusions and order.

ARGUMENT.

I.

Two Members of a Statutory Three-Judge Court Convened to Hear and Determine a Proceeding to Enjoin an Order of the Interstate Commerce Commission Cannot Determine Such Case When the Third Judge of the Court Is Unable to and Does Not Participate in Such Determination.

On December 21, 1945, appellants filed their petition in the District Court of the United States for the Southern District of Indiana, seeking temporarily and permanently to enjoin or suspend, in whole or in part, an order of the Commission entered in I. & S. Docket No. 5139, *Coal to Beloit, Wis. and Northern Illinois.* (R. 1-40.) Circuit Judge Evans and District Judge Igoe were assigned to sit with District Judge Baltzell to hear and determine the case. (R. 50.) Judge Baltzell became ill, and Circuit Judge Major was assigned to sit as District Judge in the place and stead of Judge Baltzell. (R. 106.) By agreement of all parties the hearing was held in Chicago before the Court consisting of Judges Evans, Major and Igoe. (R. 107.) Subsequent to the hearing, Judge Evans became ill and unable to participate in the determination of the causes. The findings of fact, conclusions of law and judgment were made and entered by the remaining two Judges of the statutory court. (R. 108.)

The pertinent provisions of the statute, U. S. Code, Title 28, Section 47 (which appears in full at pages 95-96, *infra*), are as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or

setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge unless *the application* for the same shall be presented to a circuit or district judge, and *shall be heard and determined by three judges*, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Emphasis supplied.)

The provision that the application shall be heard and determined by three judges, with a majority concurring in the decision, would be nullified if two judges could determine the case. The determination of the case by three judges imports a joint consideration of the case by all three of the judges. Such consideration would involve an exchange of views and a discussion of any conflicting ideas by three judges, not by two. To permit two judges acting alone to decide a case nullifies the statutory purpose of securing the benefit of joint consideration and determination of three judges.

The statute provides that at least one of the three judges shall be a circuit judge. To say that two judges could, if in agreement, determine the application would nullify this provision in cases where the circuit judge became disabled and two district judges determined and decided the case. The provision that at least one member of the three-judge court shall be a circuit judge, supports our contention that the hearing and determination be by all three members, because it is to be presumed that Congress intended the statutory court to have the benefit of the experience of the circuit judge as a reviewing judge.

The statute provides for hearing and determination by three judges. Each phase is equally important. A hearing by three judges, and determination by two, is more inconsistent in actual practice with the intent of the statute than a hearing by two judges and a determination by three. Yet it is doubtful that anyone would urge that a hearing by two judges would satisfy the statute.

We have been unable to find any decision in which this precise question was involved, but there are several decisions that involve similar questions, and they lead to the conclusion that the two judges, acting alone and without the benefit of the views of the other member of the three-judge court, had no authority to determine these cases, or enter a final decree therein.

In the case of *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U. S. 212, 216-217, a statutory three-judge court had denied an application for an injunction against an order of the Louisiana Public Service Commission. On application of the complainant, one member of the court entered an order granting a supersedeas and continuing the original restraining order until the appeal from the final decree could be determined. There this Court said (pages 216 and 217):

> "The wording of the section (Sec. 266 of the Judicial Code) leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court * * * a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. * * * We are of the opinion that a single judge has no power, in view of Sec. 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid."

In the cited case the judge granting the stay stated that one of the other judges concurred in so doing. This Court said with respect thereto (page 218):

> "This statement does not make the order here in question the act of the three judges. Judge Bryan's letter * * * was a mere expression of opinion that Judge Foster as District Judge had the power to grant the injunction, an opinion with which we do not agree. * * * Nor is there any showing that Judge Clayton took part in the matter. A discussion in conference of the judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single judge. Compliance with the statute requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct. * * * We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the motion to set it aside as void and made without jurisdiction."

Section 266 of the Judicial Code (28 U. S. C. 380) is substantially the same as the provisions of the statute governing proceedings to enjoin an order of the Interstate Commerce Commission (28 U. S. C. 47). In both there is a provision for hearing and determination by three judges, with a majority concurring in the order. See *Virginian Railway Co.* v. *United States*, 272 U. S. 658, at 672.

In *Ryan* v. *Pennsylvania Public Utility Commission*, 44 Fed. Supp. 912, 914, upon application to a statutory court for an injunction pending appeal, it is said:

> "The Court which heard the case at bar on its merits, however, cannot sit to hear the plaintiffs' application for an injunction pending an appeal because one of its members was commissioned as an officer in the United States Army on March 26, 1942 and is not available."

In *Dohany* v. *Rogers, State Highway Commissioner*, 281 U. S. 362, the Court held that a decree of a statutory three-judge court signed by one judge, which recited that (p. 369) "the court * * * being fully advised in the premises, do now here order, adjudge and decree", showed action of the three-judge court—not just the action of one judge. This decree was supported by an opinion signed by two of the judges and a concurring opinion signed by the third judge, of which the Court said (p. 370): "This we think equivalent for that purpose to an announcement in open court, three judges sitting."

We submit that only two judges of the specially constituted District Court convened to hear and determine these cases had no authority to determine the causes in the absence of the third judge of the court, and that those two judges acting alone had no authority to make and enter findings of fact, conclusions of law and final judgment in these causes.

II.

The Order of the Commission to Remove Unjust Discrimination in the Present Rates from Indiana Origins to Destinations in Northern Illinois Is Not Supported by Findings of Fact or by Evidence.

The order of the Commission of July 9, 1945, requires the carriers according as they participate in the transportation "(1) to cease and desist from practicing the unjust discrimination under section 2 of the Interstate Commerce Act * * * found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove the said unjust discrimination * * *." (R. 222.)

The report of the Commission does not contain findings of fact to support the conclusion that any rates are unjustly

discriminatory within the meaning of Section 2 of the Act, as plainly stated therein and as that Section has been construed by this Court and the Commission.

There are findings of fact in the report to the effect that the Milwaukee in 1932 "reduced its single-line rates from mines served by it in the Brazil and Linton districts in Indiana to Rockford, Freeport, and other northern Illinois destinations in the same amount as the Illinois intrastate rates to the same destinations had been reduced in 1930"; that "this resulted in a dual basis of rates from the Brazil and Linton districts," in that the rates of the Milwaukee were lower from mines served by it than the rates of other carriers serving mines on their lines in those groups; that "subsequently, the Illinois Central met the lower rates of the Milwaukee from the Linton district by establishing the same basis of rates from Linton mines served by it over its single-line routes to northern Illinois destinations"; and that "respondents now propose to extend the dual basis of rates so it would also apply from the Indiana groups to Beloit." (Finding No. 3; R. 205-206.)

The Commission further found that "the average distances over the single-line routes of the Milwaukee and of the Illinois Central are approximately the same as, and in some instances less than, those over the joint-line routes from the same origin districts to the same destinations, and are little different from the average distances thereto from all of the mines in the respective districts"; that "the present and the proposed rates from mines on the Milwaukee and the Illinois Central are lower than the present and the proposed rates from the mines on the lines of the other respondents (carriers) serving the Brazil and Linton districts"; that "the Milwaukee and the Illinois Central participate in many of the routes over which such higher rates apply to the same destinations to which they

maintain and are here proposing their lower single-line rates"; that "the Milwaukee serves 4 of the 30 origins in the Brazil district and 9 of the 31 origins in the Linton district" and that, "in a recent representative period, it hauled 95.4 per cent of the coal moving from the Brazil group and 78.5 per cent of the coal moving from the Linton group to Rockford"; and that "in general, all of the mines in these districts produce coal of the same grade and quality, and a difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another." (Finding No. 4; R. 206.) "The Milwaukee and the Illinois Central join in rates from the Princeton and Boonville groups to these northern Illinois destinations which reflect differences between those groups on the one hand, and the Brazil and Linton points served by those respondents on the other, that are substantially greater than the so-called standard differentials and greater than are warranted by the respective differences in distance." (Finding No. 5; R. 207.) "Normally, there is severe competition in the marketing of coal in the destination territory between the mine operators in each of the origin groups, and between the respective Indiana, Illinois, and western Kentucky groups." (Finding No. 7; R. 207.) "The transportation conditions under which coal moves from Indiana and Illinois groups to these northern Illinois destinations are sufficiently similar to require the use of the same rate basis from all of such groups." (Finding No. 8; R. 207.)

The foregoing is a summary of the only findings of fact made by the Commission which are pertinent to the question of unjust discrimination under Section 2.

On the basis of those findings the Commission reached the following conclusion:

> "The present and proposed rates from Indiana to the northern Illinois destinations, as published in the

tariffs enumerated in Appendix E to this report, result or would result in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee or the Illinois Central railroads, in violation of Section 2 of the act. * * *" (Conclusion 1; R. 210.)

Section 2 of the Interstate Commerce Act, *infra*, p. 96, provides as follows:

> "If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

In construing Section 2 of the Act, this Court has stated repeatedly that the purpose of this Section is to enforce equality between shippers of like commodities over the same line or haul, the same distance and between the same points; that the discrimination aimed at is that between individual shippers and not as between localities and communities; and that any fact or facts that produce an inequality of conditions and a change of circumstances justifies an inequality of charge.

In the early case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, this Court said, at pages 281-2:

> "In order to constitute an unjust discrimination under section 2, the carrier must charge or receive

directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' * * * 'To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions.''

In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, this Court said, at page 166:

"As we have shown in the recent case of *Wight* v. *United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.''

In the more recent case of *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, in construing the applicability of like provisions of the Motor Carrier Act, Mr. Justice Black, speaking for the court (p. 348), pointedly observed that "if the suspended rates were in effect, *transportation of the same commodity over the same haul* might cost a forwarder less than other shippers" and that "local less-than-truck-load rates charged shippers are in many if not most instances greater than rates on *like commodities between the same points* to be afforded forwarders under the proposed tariffs which the Commission ordered cancelled." (Emphasis supplied.) Further, at page 351:

"* * * the Act represented a manifestation of the

congressional purpose * * * to prevent favoritism by insuring equality of treatment on rates for substantially similar services. * * *"

In the case of *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1, this Court sustained the finding and conclusion of the Commission that the charges there involved did not result in unjust discrimination under Section 2 and said, at page 6:

"Section 2 is aimed at the prevention of favoritism among shippers. * * * But differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar.'"

Further, at page 9:

"We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. * * * The distinction between those cases and this is that here *the difference in the service charge is made between through shippers over different routes*, and is based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this inolved no unjust discrimination." (Emphasis supplied.)

The Commission through a long line of decisions by it has adhered to the interpretation of Section 2 by this Court.

In the case of *Petroleum Between Washington, Oregon, Idaho, and Montana*, 234 I. C. C. 609, at page 648, it is said:

"Complainants say that the disparities against them resulting from the present and proposed rates from the northern Montana points constitute the violation of section 2 alleged in their complaint without

particularity. *However, their traffic does not originate at the same points as that of their competitors, and therefore section 2 does not apply.*" (Emphasis supplied.)

In *Petroleum Rail Shippers' Assn. v. Alton & S. R.*, 243 I. C. C. 589, at page 639, the Commission said:

> "As to alleged violation of section 2 of the act: In *Pacific Lbr. Co.* v. *Northwestern Pac. R. Co.*, 51 I. C. C. 738, 760, division 1 said:
>
> > 'The purpose of section 2 of the act is to enforce equality as between shippers, and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage are compelled to pay different prices therefor. *Wight* v. *U. S.*, 167 U. S. 512, 517.'
>
> "And in *Standard Oil Co.* v. *Director General*, 87 I. C. C. 214, division 3 said, in discussing section 2:
>
> > 'If the movements are over different lines, the service is substantially dissimilar. *Tide Water Oil Co.* v. *Director General*, 62 I. C. C. 226.'
>
> "There is *no showing* herein, nor even a contention, *that different rail shippers are charged different rates for the same line-haul transportation service from origin to final destination.* There is, therefore, a *complete failure of proof as regards the alleged violation of section 2.*" (Emphasis supplied.)

In *Traffic Bureau, Lynchburg Chamber of Commerce* v. *Norfolk & Western Ry. Co.*, 248 I. C. C. 203, 208, the Commission concluded:

> "It is sufficient to say that upon the facts described no unjust discrimination in violation of section 2 would result as the compared transportation would not commence at the same origins."

Cincinnati Meat Packers Association v. *Alton R. Co.*, 258 I. C. C. 687, 692, is another instance where the Com-

mission concluded there had been no violation of Section 2, saying.

> "Complainant's allegation that the rates assailed violate section 2 of the Interstate Commerce Act is untenable. The unjust discrimination condemned by that section is that which would result from the charging of different rates for performing like and contemporaneous service in the transportation of like kinds of traffic under substantially similar circumstances and conditions of carriage *by the same railroad or railroads between the same points.* Section 2 is primarily directly against discrimination between shippers located in the same community." (Emphasis supplied.)

In *Gar Wood Industries, Inc.* v. *Alton & S. R. Co.*, 263 I. C. C. 611, 616, the Commission declined to hold that rates there assailed had been shown to be unjustly discriminatory because:

> "The provisions of section 2 apply only when the transportation is from and to the same points."

The Commission here made twenty major findings of fact. (R. 205-210.) Nowhere in those findings is it stated, and there is no evidence in the record before the Commission, that any of the coal from any origin point to any destination was being charged a higher rate than other coal from the same origin point to the same destination moving over the same line under substantially similar circumstances and conditions. Finding No. 4 of the Commission does not state any facts which constitute a violation of Section 2 of the Act. The finding shows on its face that there are 30 origin points in the Brazil group and 31 origin points in the Linton group; that the Milwaukee serves but 4 of the origins in the Brazil group and 9 in the Linton group.

The evidence affirmatively shows that the Milwaukee

rates, where lower than those of other carriers serving other origins in the Brazil and Linton groups, are via the single-line of the Milwaukee from origin to destination, while the rates in which the Milwaukee joins from origins in those groups on the lines of other carriers to such destinations are via two or more lines of railroad. In many instances the hauls via such joint-line routes are 50 to 100 miles longer than via the single-line routes of the Milwaukee. (Ex. No. 28; R. 1686.)

The evidence shows that these so-called groups or districts cover a large area. (Ex. No. 1; R. 486-A.) The origins within the groups are frequently many miles apart. The short tariff route distance from West Clinton, Indiana, to Rockford is 228 miles via the single-line of the Milwaukee; the short tariff route distance from Center Point, Indiana, on the Pennsylvania Railroad to Rockford is 283 miles, a difference in haul of 55 miles. To Geneva, Illinois, from West Clinton the single-line haul of the Milwaukee is 176 miles; the short tariff route distance via the Pennsylvania from Center Point is 294 miles, a difference of 118 miles. (Ex. No. 28; R. 1686.)

From mines in the Brazil group on the New York Central to Rockford the short tariff route distances are 275 and 283 miles, respectively, and are as much as 55 miles longer than the single-line distance from origins on the Milwaukee. The average distance from those origins on the New York Central is 42 miles greater than the average distance from origins on the Milwaukee. To Geneva, Illinois, the New York Central distances exceed Milwaukee distances by from 31 to 59 miles. (Ex. No. 28, p. 15; R. 1686.)

The distances via the short or shortest tariff routes are not necessarily the distances or routes over which coal moves from origin point to destination. For example, the distances from origins on the Pennsylvania in the Brazil

group to Rockford are shown in Exhibit No. 28 to be 275 and 283 miles, and from origins in the Linton group to be 306 miles. These distances are via routes in connection with the Milwaukee at Terre Haute and Beehunter, Indiana (Ex. No. 28, pp. 9, 14, 27; R. 1686), but the Pennsylvania has never turned over any coal to the Milwaukee at Terre Haute or Beehunter. (R. 1490.)

The practice prohibited by Section 2 of the Act is the charging, demanding or receiving a greater or less amount from one than from another shipper for performing a like and contemporaneous service under substantially similar circumstances and conditions. There is evidence that coal moved via the single-line route of the Milwaukee to Rockford; there is no evidence that any coal ever moved from any origin in the Brazil or Linton groups served by other carriers over routes in which the Milwaukee participates; there is no evidence that any coal would ever move via such routes. There is therefore no evidence upon which the Commission could predicate a finding or conclusion that there is, has been, or would be a like contemporaneous service performed in the transportation of coal from the Brazil or Linton groups via the Milwaukee alone and by other carriers in connection with the Milwaukee.

There can be no violation of Section 2 of the Act unless it is established as a fact that like and contemporaneous service for which differing rates are charged is performed "under substantially similar circumstances and conditions." There is no evidence upon which to base a finding or conclusion that transportation of coal from origins on lines of carriers other than the Milwaukee to any destination in northern Illinois is substantially similar to the transportation of coal from origins on the Milwaukee in Indiana via its single-line to destinations in northern Illinois or Beloit. The transportation conditions and circumstances in handling coal from Indiana to those destina-

tions via the single-line of the Milwaukee are in evidence in full, but there is not a word of evidence regarding the conditions or circumstances of transporting coal from any Indiana origin on the line of any of the ten (10) other carriers serving origins in the Indiana coal origin groups, except a *pro forma* showing by the C. & E. I. Railroad of distances from but two junction points in Indiana to Chicago, a point not involved in this case, the miles of single and double track, maximum grades and curves and engine ratings between certain junction points and Chicago. (R. 803-804.) The witness testifying on behalf of the C. & E. I., after hearing the witness describe the conditions on the Milwaukee, could not make any comparison of the conditions on the two roads. (R. 805.) The engine ratings given for the C. & E. I. were for a certain type of engine—there was no evidence that engines of that type were used in transporting coal from Indiana to Chicago, or what loads the engines in actual use normally haul; there was no evidence as to whether the grades and curves were so located as to hinder operations or as to be inconsequential. No witness appeared for and there is no evidence whatever in the record made before the Commission of the circumstances and conditions of the transportation of coal from origins in Indiana via the New York Central, Pennsylvania, Illinois Central, Baltimore & Ohio and Chicago, Indianapolis & Louisville Railroads, all of which serve origins in the Brazil and Linton groups, or the railroads serving any other coal origin point in Indiana.

The record in this case simply does not contain evidence of facts the existence of which must be established before a finding of violation of Section 2 can be made, *i. e.*, (a) that coal was transported by the Milwaukee and by other carriers and the Milwaukee jointly, (b) that such coal was transported from and to the same origins and destinations over the same route, and (c) that it was transported under

substantially similar circumstances and conditions. There is, therefore, no factual basis to support the conclusion of the Commission that such violation exists, or the order of the Commission to cure such alleged violation of Section 2 of the Act.

The statement in Finding No. 8 (R. 207) that "The transportation conditions under which coal moves from Indiana and Illinois groups to these northern Illinois destinations are sufficiently similar to require the use of the same rate basis from all of such groups," is not applicable to the differences in transportation conditions and circumstances under which coal moves from the carriers serving Indiana origins. We have demonstrated that as regards the carriers serving the Indiana groups, that statement is not supported by any evidence. Likewise, the statement appearing in the body of the report, page 195 (R. 183): "The transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group. * * *" is not supported by evidence, and cannot support the order of the Commission. The record is devoid of any evidence whatsoever of transportation conditions over the Illinois Central from origins served by it in Indiana.

Further, the findings and conclusions of the Commission are so vague and uncertain as to render the order incapable of application and, therefore, void.

Finding No. 5 (R. 207) states that "the Milwaukee and the Illinois Central join in rates from the Princeton and Boonville groups to these northern Illinois destinations which reflect differences * * * greater than the so-called standard differentials and greater than are warranted by the respective differences in distances." Conclusion No. 1 (R. 210) states the "present and proposed rates from Indiana to the northern Illinois destinations * * * result or

would result in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee or the Illinois Central Railroads, in violation of Section 2 of the act." The order is to cease and desist from practicing the unjust discrimination under Section 2 of the Act found in the report to exist and to publish rates which will avoid and remove said unjust discrimination. (R. 222.)

The conclusion embraces all of Indiana, including the Princeton and Boonville groups, no origins in which are served by either the Milwaukee or the Illinois Central. From the Conclusion No. 1 and the order it is not clear as to what rates are deemed to be unjustly discriminatory; the conclusion embraces all rates on coal from Indiana to all destinations where such coal is transported, in whole or in part, by the Milwaukee or the Illinois Central. It includes rates from every origin in every group in Indiana in which the Milwaukee or the Illinois Central participates. The only way by which those two railroads could comply with the order would be to cease transporting coal via their single-line routes and also cease participating with other carriers in the transportation of coal from Indiana to those Illinois destinations. The findings and conclusion of the Commission are so vague and uncertain that they do not support the order.

The principle announced in the case of *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, at pages 200-203, is applicable here. There it was held that where the Commission has for years decided cases of discrimination by "reference to and consideration of all pertinent facts, circumstances and conditions affecting the rates in effect at any particular time" it cannot depart from that policy and base a decision on one factor only—cost of service—without stating each of the other factors, why they are not considered, and the reasons why the new policy conforms to the Act. So here, where the Commission seeks to abandon the

long adhered to rule that there can be no discrimination where the shipments originate at different origins, or move over different routes, the Commission should state its reasons for so doing and show that this present ruling conforms to the Act.

We submit that the order of the Commission is not supported by findings of fact or by evidence, is uncertain, and is void and should be enjoined and set aside so far as it pertains to unjust discrimination in violation of Section 2 of the Act.

We further submit that in so far as unjust discrimination in violation of Section 2 of the Act is concerned the District Court erred in concluding as a matter of law that: "The Commission's report and order dated July 9, 1945, were made within its statutory authority and are supported by adequate findings of fact," that "The findings of the Commission as set forth in the report and order of July 9, 1945, have substantial support in the record made before the Commission and afford a rational basis for its conclusions," and that "The Commission's report and order are lawful and valid in all respects." (R. 111.)

III.

The Conclusion That the Present and Proposed Rates from Indiana to Destinations in Northern Illinois Result or Would Result in Undue Preference and Prejudice as Between Origins in the Brazil and Linton Groups and as Between the Respective Indiana Groups in Violation of Section 3 (1) of the Act, and the Order to Cease and Desist from Such Violation and Maintain Rates Which Will Avoid and Remove Such Violation, Are Not Supported by Findings of Fact or by Evidence.

The only findings of fact made by the Commission pertinent to the question of undue preference and prejudice are those summarized *supra* at pages 33-34.

Conclusion No. 1 of the Commission (R. 210) states: "The present and the proposed rates from Indiana to the northern Illinois destinations * * * result or would result in * * * undue preference and prejudice as between the origins in the Brazil and Linton districts, and as between the respective Indiana districts, in violation of section 3 (1) of the act, in and to the extent that such rates reflect or would reflect rate relations between such districts and between points in each of those districts to the respective destinations which differ from the relations reflected by the rates and the rate bases set forth as approved in this report, including Appendixes A and D hereto."

The order requires the carriers according as they participate in the transportation "(1) to cease and desist from practicing * * * the undue prejudice and preference under section 3 (1) of said act, found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove said * * * undue prejudice and preference." (R. 222.)

Section 3 (1) of the Act (49 U. S. C. 3 (1)) (*infra*, pp. 96-97) provides as follows:

> "It shall be unlawful for any common carrier * * * to make, give, or cause any undue and unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, * * * region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, * * * region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; PROVIDED, HOWEVER, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

There are two situations to which the order applies, (1)

as between origins in the Brazil and Linton groups, and (2) as between the respective Indiana groups. We will discuss the matter in that sequence.

The evidence shows that from origins served by it in the Brazil and Linton groups the Milwaukee charges via its single-line route a lower rate to Rockford and other destinations in northern Illinois than is charged by carriers serving other origins in those groups. The evidence further shows that the Milwaukee participates in some of the tariff routes from origins on such other carriers over which the higher rates apply. The same situation was shown with respect to the Illinois Central from origins served by it in the Linton group. The only other evidence was of the distances via shortest tariff routes from the origins, and the fact that while the Pennsylvania Railroad published rates via short tariff routes in which the Milwaukee participated, no coal ever moved via such routes, and that any coal from origins on the Pennsylvania consigned to northern Illinois destinations was hauled to Chicago and there turned over to connections for the transportation to destination, which routes are 60 to 80 miles longer than the short tariff routes. (R. 791-792.)

There is evidence of the total shipments of coal from the Indiana groups to but seven of the destinations in northern Illinois involved in this case for the years 1936 and 1941 and the first six months of 1942 (Ex. No. 4, Sec. VIII; Ex. No. 99), but there is no evidence of the routes or carriers over which or the specific origins from which such shipments moved. Exhibit No. 4, Sections VIII and IX, and Exhibits Nos. 5, 10, 99, 100 and 101 (R. 1677, 1678, 1679, 1697), which deal with production and shipments of coal from the various groups, will be examined in vain without discovering any showing of shipments from any specific origin in any group in Indiana or Illinois to any destination in the territory involved in this case, or the destination ter-

ritory taken as a whole. There simply is no evidence in this record of shipments or movements of coal from Indiana to support any finding or inference that there exists any preference or prejudice between (a) origins in the Brazil and Linton districts, or (b) the respective Indiana districts.

There is no evidence that any mine served by a carrier other than the Milwaukee would ship any more or less coal than it has previously shipped to destinations in northern Illinois on the Milwaukee, (1) if the rates of the Milwaukee were increased to the level of the rates applicable from such other mines, or (2) if the Milwaukee cancelled its rates. There is no evidence that any mine in the Brazil or Linton groups ever lost any business to a mine served by the Milwaukee. There is no evidence that any mine in either of said groups was prevented from securing an order for coal at any of these Illinois destinations by reason of the rates in effect from mines served by the Milwaukee. There is a complete lack of evidence that any person, company, firm, corporation, association or locality in either the Brazil or Linton groups were given or received any advantage or preference or were subjected to any disadvantage or prejudice by reason of the single-line rates of the Milwaukee from origins served by it to any destination. The foregoing is equally true with regard to the origins served by the Illinois Central in the Linton group. The appellants here include operators whose mines are served by the Milwaukee and all the other carriers serving mines in Indiana.

The rates from the origins on the Milwaukee are on the basis of the standard differentials with the rates from the mine groups in Illinois. (R. 1062.) The standard differential is that the Brazil group rates are 30 cents per ton less than the rates from the Southern Illinois group and on a parity with the rates from the Springfield group in Illinois. (R. 1066-1070.) These standard differentials apply to all destinations in Wisconsin, except along the Lake, eastern

Iowa and southeastern Minnesota, and prior to the reduction of intrastate coal rates to northern Illinois destinations, to all of northern Illinois. (R. 1070.) The one witness who is engaged in the coal business who testified in this case stated that he thought it would be preferable to have all the rates from the Brazil and Linton groups on one level, and that should be the level of the Milwaukee rates, which are properly related to the rates from the Illinois groups. (R. 1466.) The Commission in I. C. C. Docket No. 25595, reported 204 I. C. C. 225, found that standard differential relationship between the Indiana and the Southern Illinois groups "fair and reasonable to all concerned," as it applied to Wisconsin, Minnesota and Iowa. The differences in distance to the destinations in Wisconsin, Minnesota and Iowa are not as much in favor of Indiana as to destinations in northern Illinois. (Ex. No. 49; R. 1074, 1689.)

The Commission, in holding that the single-line rates of the Milwaukee and Illinois Central prefer shippers on those lines and prejudice shippers on other lines serving mines in the Brazil and Linton groups, wholly ignores the fact that the Illinois mines enjoy rates to Rockford and other destinations which are much more favorable to them as compared to Indiana shippers than are the rates generally to the surrounding territory. The Commission also ignored the significance of Exhibit No. 4, Part VIII (R. 1677) and Exhibit No. 99 (R. 1697), which show that, exclusive of Rockford, to the seven destinations for which there is a record of coal shipments, Indiana shipped but 57,146 tons, while Illinois shipped 292,771 tons of coal in 1941; whereas, to Rockford, where Indiana operators served by the Milwaukee and the Illinois Central had rates on the standard relationship with Illinois, Indiana shipped 211,561 tons of coal in 1941 and Illinois 276,101 tons. In 1936, the first full year after the Milwaukee rates were restored to their standard relationship with Illinois rates, after being out of

the market for four years, 1930 to 1934, Indiana shipped only 51,347 tons to Rockford, as compared with 208,029 tons from Illinois.

While this Court does not undertake to draw inferences from evidence before the Commission, leaving that function to the Commission, we submit that there is no basis for any inference or assumption that shippers from the Brazil and Linton groups via multiple-line routes are prejudiced by the single-line rates of the Milwaukee and Illinois Central, or that shippers on those two lines are preferred over shippers via the multiple-line routes. The evidence negatives such an inference or assumption by showing clearly that the competition from the Illinois mines is the factor that prevents Indiana shippers, not having rates on the standard relationship to Illinois rates, from shipping more coal to these destinations.

The Commission recognized the absence of any evidence of prejudice and preference in the record, by the statement on page 195 of its report (R. 183, 184), that "an extensive showing of injury through the loss of tonnage to particular coal shippers or consumers by reason of the discriminatory rates here before us is not required. *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344. The situation presented is in principle similar to that before us in *Fairbanks-Morse & Co.* v. *Alton & S. R.*, *supra*, pages 201-206, wherein we found that the maintenance of higher rates from six mines in the Southern Illinois district to Janesville and Clinton Junction, Wisconsin, was unduly prejudicial and preferential to the extent they exceeded the contemporaneous rates to the same destinations from other mines in the same district."

The situations presented in the two cases cited in the report are so very different from that here involved that those cases are no justification for the Commission making a finding or concluding, in the absence of any evidence of

injury, that any Indiana rates are unduly prejudicial and preferential. In the case of *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, the issue was whether the transportation by truck of like goods, over the same route, the same distances, frequently in the same trucks, at a lower rate for one shipper than for another, constituted a violation of Section 216 (d) of the Act. The sole question was whether charging a freight fowarder less than a commercial shipper violated the Act, and this Court sustained the Commission's conclusion that the lesser charge for identical service collected from the fowarder than from the commercial shipper was a violation. The difference in rates was based solely upon a difference in identity of shippers, a circumstance wholly irrelevant to the carrier service rendered.

In *Fairbanks-Morse & Co.* v. *Alton & S. R. Co.*, 251 I. C. C. 181, pages 201-206, there was evidence of threatened loss of business which was only retained by the mine operators, complainants, reducing their prices by the amount of the reduction from the six favored origins; the same carriers served the origins having the lower rates and those having the higher rates; the distances from the origins having the lower rates were greater than those having the higher rates. The evidence is recited in detail in the Commission's report of that case, and it is full and complete. That case is far from deciding that the maintenance of lower rates from an origin by a railroad having a single-line haul is unlawful because other railroads serving other points maintain higher rates from such other origins to the same destination. It does not sustain a holding that evidence of injury to one and benefit to another is not essential to sustain an order to cease a violation of Section 3 (1) of the Act.

The second phase of the undue prejudice and preference covered by the order is as between the respective Indiana

groups. The only finding of the Commission on that subject is Finding No. 5 (R. 207) to the effect that "the Milwaukee and Illinois Central join in rates from the Princeton and Boonville groups to these northern Illinois destinations which reflect differences between those groups on the one hand, and the Brazil and Linton points served by those two respondents on the other, that are substantially greater than the so-called standard differentials and greater than are warranted by the respective differences in distance."

Again there is absolutely no evidence of injury to any shipper in the Princeton or Boonville groups. The one witness connected with an operating Indiana coal company who testified in this proceeding was the manager of companies operating a large mine in each the Princeton group and the Boonville group, as well as a large mine in the Northern Illinois group, respecting which latter most of his testimony was directed. This witness testified regarding the markets for Indiana coal, the relation of Boonville rates and distances to Southern Illinois, that an increase in the rates from the Sunlight (Boonville) and Tecumseh (Princeton) mines of his companies would decrease shipments from those mines to northern Illinois. (R. 1461, 1462.) He further testified that where one railroad has lower rates from the same group to a common destination than other railroads serving such group, the movement is over the lines having the lower rates; that the Milwaukee rates are lower than the rates over other carriers serving the Brazil and Linton groups; that this situation is a maladjustment; that the rates of the Milwaukee are on the proper relative basis compared with the Illinois groups; and that the Indiana rates from other districts should be adjusted to the rates of the Milwaukee from the Brazil group. (R. 1465, 1466.)

The witness did not testify that the single-line rates of the Milwaukee or the Illinois Central prejudiced the mines

he managed in the Princeton or Boonville groups, or that he could sell and ship more coal to northern Illinois if the rates of the Milwaukee and Illinois Central were cancelled or if they were increased. It is obvious from the witness' statement that the relationship to the Illinois rates is the prime factor controlling his ability to ship coal to these northern Illinois destinations.

The finding that the difference between the Milwaukee rates from Brazil and Linton origins and the rates from Boonville and Princeton are greater than the difference in distance warrants is contrary to the facts, and contrary to the Commission's conclusions as shown by the rates approved by it. This is shown by the following:

To Rockford, the rates and average distance from Milwaukee origins in the Brazil group are $1.80 and 237 miles; from Princeton the rate is $2.09 and the distance 375 miles and from Boonville the rate is $2.12, distance 409 miles—differences in distance of 138 and 172 miles and differences in rates of 29 and 32 cents per ton, respectively. (Ex. No. 28; R. 1686.) The rates approved by the Commission reflect a difference of 30 cents per ton Springfield under Southern Illinois for differences in distance ranging from 106 miles at Rockford to 149 miles at Belvidere, and averaging 129 miles to the twelve representative destinations. (R. 213, 216, 220.) The difference of 29 cents for 138 miles is more favorable to Princeton as compared with the Milwaukee, than the Southern Illinois relation to Springfield of 30 cents for an average longer haul of 129 miles. The average difference in distance between the Fulton-Peoria group and the Belleville group to the twelve representative destinations is 168 miles, the difference in the average approved rates is 46 cents per ton. (R. 220.) If 46 cents measures a fair relation where the difference in distance is 168 miles, it cannot be said that 32 cents is too great a difference in rates for a difference in distance of 172 miles, as between Mil-

waukee origins in the Brazil and Linton groups on the one hand and the Boonville and Princeton groups on the other hand.

The Commission and this Court have consistently held that a mere disparity in rates is not a violation of Section 3 (1); that the rates assailed must be a source of advantage to the one and a detriment to the other person or locality; that but for such rates traffic would not have moved from the favored person or locality or would have moved from the other; and that to be prohibited by Section 3 (1) the preference or prejudice must be "undue or unreasonable."

In *Chicago Live Stock Exchange* v. *Abilene & Southern Ry. Co.*, 223 I. C. C. 141, the Commission said, at page 152:

> "It is well settled that a *mere disparity in rates does not establish undue prejudice.* Preference and prejudice are not prohibited unless they are undue, and *to be undue they must be a source of advantage to the party or locality alleged to be favored and a detriment to the other party or locality.*" (Emphasis supplied.)

In *Michigan Fertilizer Co.* v. *Louisville & N. R. Co.*, 214 I. C. C. 585, 587, it is said:

> "Preference and prejudice are not prohibited unless they are *undue.* To be undue they must be a source of advantage to the party or locality alleged to be favored and a detriment to the other party or locality. The question, *whether they are undue, is one of fact, to be determined by us after consideration,* not only *of relative distances and transportation conditions,* but of *all matters which carriers,* apart from any question arising under the statute, *would treat as cause for a preference or advantage.*" (Emphasis supplied.)

Further, in the very recent decision in *A. E. Staley Mfg.*

Co. v. *Baltimore & Ohio R. Co.*, 262 I. C. C. 352, 356, the Commission said:

> "The *existing difference between the rates* assailed and the lower rates which prevail on the Midland and other lines *does not, for that reason, subject complainant to undue prejudice.* * * * The Complaint will be dismissed." (Emphasis supplied.)

In the case of *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, it is said at page 481:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 * * * renders unlawful any '*undue* or *unreasonable*' preference or advantage, prejudice or disadvantage. * * * And in the first paragraph of amended Section 15 * * * it is rates, regulations, or practices that in the opinion of the Commission are '*unjustly* discriminatory or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied."

In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, at page 521, it is stated:

> "But mere discrimination does not render a rate illegal under § 3. Only such rates as involve unjust discrimination are obnoxious to that section."

We contend also that an order to remove an undue preference and prejudice must accord to the carriers affected an alternative of either reducing the higher rate or increasing the lower, or a combination of the two. To do this, the carrier or carriers involved must control both rates. A carrier cannot be found to be guilty of an undue preference or prejudice if it does not effectively participate in both of the rates involved.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, the rule of law and proposition here urged were discussed fully. The Court there said, beginning at page 646:

> "By its second order the Commission excluded the

Texas & Pacific and the L. R. & N. from its findings of undue preference and prejudice and exempted them from the requirement as to differentials. * * * Exemption was * * * granted * * * pursuant to a rule which the Commission had consistently followed since its organization: namely, that *a carrier may not be held responsible for undue prejudice or preference* unless both of the localities affected are upon its lines, *or it effectively participates in the rates to both* * * *. Though the Texas port lines can reduce their rates to and from those ports without the concurrence of the New Orleans lines, no reductions can be made in those rates by the New Orleans lines, even from or to their local stations, without the concurrence of one or more lines reaching the Texas ports. Clearly the New Orleans carriers *have no effective control over the rates* between their junction points and the Texas ports.

"Where * * * a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but *cannot make or control* the latter *rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it.* * * * The reason for the doctrine is that *preference or prejudice can be found only by a comparison of two rates.* * * * Assuming that neither rate is unreasonable, the *one carrier cannot be compelled to alter its rate, because the other's is higher* or lower for the same service. *A carrier or group of carriers* must be the common source of the discrimination—*must effectively participate in both rates, if an order for correction of the disparity is to run against it or them.* Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. * * * The situation must be such that the carrier or carriers if given an option have an actual alternative. * * *

"What Congress sought to prevent by that section (3), as originally enacted, was not differences between localities in transportation rates, * * * but unjust discrimination between them by the same carrier or carriers." (Emphasis supplied.)

The Commission has consistently adhered to the doctrine that to sustain a complaint under Section 3 (1) the carrier or carriers allegedly responsible for unduly preferring one shipper at the expense of another must participate in both shipments and must effectively control the rates under which such shipments are made. *Anchor Storage Co.* v. *Alton R. Co.*, 211 I. C. C. 307, 309; *Dunn Woolen Co.* v. *Baltimore & O. R. Co.*, 220 I. C. C. 223, 226; *Jones & Kavanagh Co.* v. *Southern Pacific Co.*, 219 I. C. C. 105, 107.

There is no finding, and there is no evidence in the record before the Commission, that the Milwaukee or the Illinois Central effectively participates in or controls any of the rates from the Indiana groups to destinations in northern Illinois, other than the single-line rates which they themselves publish. For example, there is no evidence that the Milwaukee could reduce the rates from mines served by the C. & E. I. or any other carrier serving mines in the Brazil and Linton groups. There is no evidence that the C. & E. I., the Pennsylvania, or any other road serving mines in either of said groups ever requested the Milwaukee or the Illinois Central to join in rates to any destination, to which the Milwaukee or the Illinois Central publishes single-line rates, on the same level as said single-line rates.

In *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, there was involved the creosoting-in-transit privilege which was alleged to violate Section 3 (1) of the Act. The undue preference and prejudice found to exist was that the Central Railroad of New Jersey and the

Pennsylvania, which served a creosoting plant at Newark, New Jersey, failed to establish the creosoting-in-transit privilege at that point, while joining in joint through rates from Illinois, Indiana, Ohio and Pennsylvania, where creosoting-in-transit was permitted by carriers other than the Central Railroad and the Pennsylvania.

In reversing a decree of the District Court which had refused to enjoin the order of the commission, this Court stated that the Central Railroad and the Pennsylvania did not provide any such basis at any point on their lines and that no competitor of the complainant has a plant on the lines of either of said carriers, that under the rules of the Commission privileges like creosoting-in-transit are treated as a matter of policy on the part of the carrier on which the plant is situated, and whether the privilege shall be granted is determined by the local carrier.

The opinion then continues, at page 257:

> "The Commission might, therefore, acting under § 1, have directed the Central and the Pennsylvania to establish the creosoting-in-transit practice at Newark, if it deemed failure to do so unreasonable or unjust; or it might, in an appropriate proceeding, have directed the southern and midwestern carriers to discontinue the practice on their lines, if it deemed the granting of the privilege to be unreasonable or unjust. But it did neither. Instead it sought to accomplish by indirection either one result or the other and ordered under § 3 that the discrimination found to exist be removed. Twenty-one of the appellants are powerless either to cause the Central and the Pennsylvania to instal the privilege at Newark or to cause the southern and midwestern carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise powerless to cause these connecting carriers to withdraw the privilege.
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"It is insisted that the order leaves appellants the alternative of withdrawing from the tariffs which establish joint rates with the southern and midwestern carriers through Newark. The order does not so provide in terms; and in fact the alleged alternative is illusory. The undue prejudice found arises not from the existence of joint rates, but from conditions local to other railroads. Cancellation of the joint rates would not change those conditions. Although the joint rates were withdrawn, the established through routes would remain.

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"It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under § 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. *But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination;* as where a lower joint rate is given to one locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18. If this were not so, *the legality or illegality of a carrier's practice* would depend, *not on its own act, but on the acts of its connecting carriers.*" (Emphasis supplied.)

Applying the principles stated in the foregoing case, the order of the Commission in this case would require the Milwaukee to give up its legal right to initiate rates on

which it can transport coal to this destination territory in competition with coal originating in Illinois, and would force the Milwaukee to join in a policy adopted by other carriers serving the Brazil and Linton groups of not participating in traffic to Rockford and other destinations in northern Illinois and to Beloit. The order of the Commission would deprive the Milwaukee and the Illinois Central of that right which this Court has often reiterated, *i. e.*, the right to initiate and maintain rates that are lawful within the zone of reasonable minimum and reasonable maximum rates.

As stated in the case of *United States* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 294 U. S. 499, at page 506:

> "There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. *A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.* We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best.' *United States* v. *Illinois Central R. Co., supra.*" (Emphasis supplied.)

The Commission, in the case of *Illinois Coal Traffic Bureau* v. *Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, discussing an allegation that the rates from Indiana and the rates from certain origin groups in Illinois to points in Wisconsin, Iowa and Minnesota subjected southern Illinois shippers to undue prejudice and accorded to Indiana shippers an undue preference, said at page 241:

> "Our conclusion herein is further strengthened by the indefiniteness of the record upon the fact of in-

jury to complainant's members by reason of the rate adjustment complained of. *No one testified that southern Illinois lost any business to Indiana by reason of the rate adjustment as a controlling factor.* There is evidence that tonnage was lost from southern Illinois to Indiana and *vice versa*, but in no instance does it appear definitely that with a more favorable rate adjustment southern Illinois could have retained any business which it lost to Indiana. Undue prejudice ordinarily cannot exist unless it be clearly established that the rates complained of constitute a source of undue disadvantage to one and of undue advantage to another, *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 334; in other words, unless it is made to appear that the resulting injury would cease upon removal of the alleged prejudice in rates. *Sewerage Comm. of Milwaukee* v. *Aberdeen & R. R. Co.*, 190 I. C. C. 601. So far as this record shows, the losses about which southern Illinois is here complaining cannot be ascribed in any material degree to the relation of its rates with those from Indiana." (Emphasis supplied).

The principle enunciated in the case of *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, at pages 200-203, above referred to, is equally as applicable to the question of prejudice and preference as to unjust discrimination. The Commission cannot depart from established criteria without showing sound reasons for so doing.

We submit that part of the order to cease from practicing the undue prejudice and preference found in the report to exist is not supported by findings of fact or by evidence, and that the District Court erred in failing to set aside and enjoin that portion of the order. The conclusions of the District Court as applied to this phase of the order are unjustified and erroneous.

IV.

The Commission Had No Authority to Order an Increase in or Change in the Relationship of the Present Rates from Indiana in the Proceeding I. & S. Docket No. 5139.

The order of July 9, 1945, requires the respondent carriers to cancel the new rates which were published in 1942 and suspended by the Commission by its order of July 30, 1942. The order proceeds further to require the carriers "according as they participate in the transportation * * * (1) to cease and desist from practicing the unjust discrimination * * * and the undue prejudice and preference * * * found in said report to exist, and (2) to publish, maintain and apply rates * * * which will avoid and remove the said unjust discrimination and undue prejudice and preference." (R. 222.) The latter part of the order can and does apply only to the present rates from Indiana origins, *i. e.*, the rates in effect at the time of the entry of the order, a subject matter that was not before the Commission in the I. & S. Docket No. 5139 proceeding.

The jurisdiction of the Commission over and its authority to suspend rates are contained in and may be exercised only under the provisions of Section 15 (7) of the Interstate Commerce Act (*infra*, p. 99). That Section reads in part as follows:

> "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate * * * the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint * * * to enter upon a hearing concerning the lawfulness of *such* rate * * * and after full hearing * * * the commission may make such order with reference *thereto* as would be proper in a proceeding initiated after it had become effective. * * *" (Emphasis supplied.)

The Commission, acting within the scope of the power granted to it by this Section, upon complaint filed by the Coal Trade Association of Indiana, entered its order of July 30, 1942 (R. 141-144), reciting that there had been filed with the Commission tariffs containing schedules stating new individual and joint rates, to become effective August 2, 1942, and later, and listing a number of supplements to tariffs of various railroads. The order then proceeded:

> "IT IS ORDERED, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs,
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> * * * * *
>
> "And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order.
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> * * * * * *
>
> "IT IS FURTHER ORDERED, That the operation of the said schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 2nd day of March, 1943 * * *."

The order of the Commission of July 30, 1942, clearly deals only with the new rates contained in the schedules enumerated in the order, the effectiveness of which was suspended. The proceeding instituted by the order, the investigation and the hearing entered into concerned only the lawfulness of the new rates.

The complaint, or protest and request for suspension (R. 131-140) filed with the Commission, and referred to in the order of investigation and hearing, contains no allegation or suggestion of unlawfulness in any respect of any of the rates from Indiana mines then in effect. That complaint was directed solely to certain rates and

rate relationships proposed to be put into effect in the new schedules published by the carriers which the protestant considered violative of Sections 1, 2 and 3 of the Act.

In his statement at the outset of the hearing ordered by the Commission, the Examiner did not state that the hearing would be concerned with any feature of the present rates from Indiana or any other district. (R. 228-231.) No party to the proceeding before the Commission, through pleading filed, argument made, or evidence introduced in the hearings before the Examiner, in brief, in exceptions to the proposed report of the Examiner or in argument before the Commission, suggested or contended that the present rates were in issue or that the present rates from Indiana, in relation to each other, were in any respect unlawful.

The Commission did not enter upon an investigation or order any hearing with respect to the present rates. It did not set for hearing any issue of lawfulness of the present rates. No interested or affected party had any notice of a hearing, nor did any such party introduce any evidence with respect to the lawfulness or unlawfulness of the present rates. The jurisdiction and authority of the Commission to act on the present rates never having been invoked, and there having been no hearing regarding the lawfulness of the present rates, the Commission had no power to enter an order with respect thereto.

Section 15 (1) of the Act provides (*infra*, p. 98):

> "*Whenever*, after full hearing, upon a complaint made as provided in section 13 of this chapter, or *after full hearing under an order for investigation and hearing* made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, *the commission shall be of opinion that any* * * * *rate* * * * *is or will be* unjust or unreasonable or unjustly discriminatory or

unduly preferential or prejudicial, or otherwise *in violation of any of the provisions of this chapter, the commission is authorized and empowered* to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and * * * *to make an order that the carrier or carriers shall cease and desist from such violation* to the extent to which the commission finds that the same does or will exist * * *." (Emphasis supplied.)

This Section of the Act authorizes the Commission to enter an order that a "carrier or carriers shall cease and desist from such violation" only after a "*full hearing* under an order for investigation and hearing." Clearly, there must be a hearing with respect to the subject matter covered by such order.

In the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, at page 262, the Court said:

"* * *the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under §§ 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed * * *. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91. In the instant proceeding the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action

was not within the permitted range of the Commission's discretion, but was a denial of right. * * *"

So in the instant case, the entry of an order which acts directly and solely upon the present rates, without a "hearing under an order for investigation and hearing" regarding the lawfulness of those rates, violates a fundamental requirement of the Act. No "order for investigation or hearing" as to the lawfulness of any present rate or rates from Indiana mines was ever entered by the Commission. It is only after a full hearing *upon an order for investigation and hearing respecting specifically the existing rates* that there is any authority in the Commission under Section 15 (1) to enter an order requiring the carriers to desist from charging the existing rates. The full hearing required by the Act must necessarily be with respect to the subject matter of the order. The Commission order of July 30, 1942, instituting the proceeding in which the order here under review was made, will be examined in vain for any suggestion of an investigation and hearing regarding the question of discrimination, under Section 2, or undue prejudice and preference, under Section 3 (1), in respect to the present rates from the Indiana groups to destinations in northern Illinois.

In the case of *Morgan* v. *United States,* 304 U. S. 1, at page 18, the Court said:

> "The right to a hearing embraces not only the right to present evidence but also a *reasonable opportunity to know the claims of the opposing party* and to meet them. * * * Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are *entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.*" (Emphasis supplied.)

If the Commission intended to deal with the present

rates in I. & S. Docket No. 5139, the parties were entitled to know that those rates were to be considered and to be in a position in the hearing to present evidence with respect to those present rates to show whether or not they were lawful. No such opportunity was given. The jurisdiction of the Commission, its power and authority under the Act to correct any alleged unlawfulness in the present rates, was never invoked.

The fact that the Commission might, under the provisions of Section 15 (1) of the Act, order an investigation of the present rates, is no answer to the contention of the appellants herein that in the instant case the Commission did not do so, and did not have the present rates before it for consideration.

No party questioned the right of the Milwaukee to maintain single-line rates less than joint-line rates of other carriers serving origins in Brazil and Linton to destinations in northern Illinois. No party conceived that question was involved in the proceeding. That question had been raised years ago and decided by this Court. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499. If the Commission had intended to consider again that question in this proceeding it owed a duty to notify the parties of that intention in clear language. The order of July 30, 1942, reciting the filing of schedules of new rates, and ordering that the Commission "enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in said schedules contained in said tariffs" confines the hearing to the lawfulness of the new rates. The tariff supplements containing the new rates do not contain any of the present rates to destinations in Illinois. These supplements were introduced in evidence in the District Court. (R. 1614-1661.)

We do not argue that in a proper case the Commission could not require changes in the present rates. We do not

argue that in the I. & S. Docket No. 5139 proceeding it was beyond the power and authority of the Commission, if the evidence and findings were adequate to support such an order, to require the carriers to publish and maintain specific rates named by the Commission in lieu of the suspended rates, even though the prescribed specific rates differed from the present rates. The Commission did not require the publication of any specific rates; it required merely the cancellation of the suspended rates. It approved a vast number of rates as maximum, and required cancellation of the suspended rates without prejudice to the carriers publishing rates on the bases approved. We can only deal with the order entered by the Commission, and beyond the cancellation of the suspended rates, the only mandatory requirement of the order was with respect to the present rates.

We submit that the only question before the Commission under the order entering upon the investigation and hearing in I. & S. Docket No. 5139 was the lawfulness of the new rates, and that therefore the Commission had no authority to enter any order to change the present rates. It had exhausted its jurisdiction when it ordered the new rates cancelled—that part of the order completely disposed of the question of the lawfulness of the new rates.

The District Court was in error in concluding that the Commission's report and order were made within its statutory authority, that the plaintiffs (appellants) were afforded a full and fair hearing before the Commission, that the record made before the Commission discloses no error of law, that the report and order are lawful and valid in all respects and that the complaints should be dismissed.

V.

The Commission Had No Authority or Jurisdiction in I. & S. Docket No. 5139 to Approve Rates from the Boonville Group on a Parity With Rates from the Princeton Group, or to Enter Any Order Requiring the Present Rates to Be on a Parity.

The Commission in its report approved rates from each of the groups in Indiana to twelve destinations in Illinois. To each destination the approved rates from the Boonville group are the same as the approved rates from the Princeton group. (R. 213-216.)

The order under review requires the carriers serving mines in Indiana to remove the undue preference and prejudice found in the report to exist. Conclusion No. 1 of the Commission report (R. 210) states that undue prejudice and preference exists in the present rates "as between the respective Indiana districts, in violation of Section 3 (1) of the Act, in and to the extent that such rates reflect or would reflect rate relations between such districts * * * to the respective destinations which differ from the relations reflected by the rates and the rate bases set forth as approved in this report, including appendixes A and D hereto."

Finding No. 13 (R. 208), is to the effect that "the difference in the distances from the single important mine in the Boonville group and from nearby mines producing similar coal in the Princeton group to Beloit and the northern Illinois destinations is small"; that "a merger of the two groups will increase the average distance from the Princeton group to the 12 representative northern Illinois destinations * * * by only 8 miles"; that "the movement from the Boonville group to this destination territory has been and is negligible"; and that "accordingly, the rates from the Boonville mines to these destinations should not

exceed those from the Princeton district to the same destinations."

There are no other findings of fact regarding the relationship between the Boonville and Princeton groups.

The statement that the difference in distance from the one important mine in the Boonville group and from nearby mines producing similar coal in the Princeton group is small, is not supported by, and is contrary to, the evidence. The evidence is that the Sunlight mine is 10 miles across country from the Tecumseh mine in the Princeton group. (R. 1460.) Tecumseh is on the New York Central; Sunlight is on the Southern Railway. (R. 1460.) There are 8 origins in the Boonville group, and the average distance from that group to each of the twelve destinations is the same as or within 2 or 3 miles of the distance from Sunlight. The average distance from all mines in the Princeton group to Rockford is 375 miles and from the Boonville group it is 409 miles; from the Sunlight mine, 408 miles. (Ex. No. 28, page 3; R. 1686.) To all the twelve destinations, Exhibit No. 28 shows the average distance from the Boonville group to be 392 miles and from the Princeton group to be 358 miles—a difference of 34 miles.

From origins on the Southern in the Princeton group, the distances are 49 miles less than from the Boonville group to Rockford, Freeport, Dixon and Rochelle. (Ex. No. 41; R. 1688.) The Commission in this report approves rates from the Linton group 10 cents per ton over rates from the Brazil group where the average difference in distance between the two groups is 37 miles. (Appendix D to Report; R. 220.) On page 198 of the report the Commission recites the above facts regarding the Brazil and Linton group rates and distances, and states: "We find that the differential between the Brazil and Linton districts to these destinations, including Beloit, should be 10 cents." (R. 187.)

We submit that if a difference of 37 miles in the average distance between the Brazil and Linton groups warrants a differential of 10 cents per ton, then the average difference of 34 miles between Princeton and Boonville is not "small" and inconsequential. As shown by Exhibit No. 28, the distances from some mines in the Linton group are less than from mines in the Brazil group to the same destination—but the Commission approves a differential of 10 cents per ton between those mines, the same as all mines in the groups.

That the average distance from the Princeton group is increased only 8 miles by including the Boonville origins is due to the fact that there are 29 origins in Princeton and 8 origins in Boonville, and dividing the total miles from the 37 origins by 37 dilutes the longer Boonville distances by the greater number of shorter distances from Princeton.

There is no finding or contention that the present rates from Boonville are unreasonably high. The Commission approves rates from Boonville which are higher than the present rates. The Commission states that the rates from Boonville are lower than they should be because of the low differential over the Linton rates. (Report, page 201; R. 190.) Clearly the Commission does not deem the Boonville rates excessive.

There is no evidence that the relationship between the Princeton and Boonville rates unduly prefers Princeton or prejudices Boonville. There is no evidence of unjust discrimination against Boonville group mines because they are charged higher rates.

There are no findings of fact that the Boonville or Princeton group rates are unlawful in any respect. Such a finding is a condition precedent to the jurisdiction and authority of the Commission to enter any order affecting those rates. See *United States* v. *Chicago, Milwaukee, St. Paul*

& Pacific R. Co., 294 U. S. 499, at 504, where it is said:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power."

For these reasons and the considerations set forth under Point IV of this argument, *supra*, pp. 62-68, the order of the Commission in I. & S. Docket No. 5139, so far as it purports to operate upon the rates from the Boonville and Princeton groups, is void and should be enjoined.

VI.

The Commission Had No Authority or Jurisdiction to Approve Specific Rates to Each of a Number of Widely Separated Destinations in Northern Illinois on the Basis of the Average of the Rates and Distances from Each Origin Group to All the Destinations, Where the Amounts of Such Rates and the Relationships in the Rates from the Various Origin Groups Vary at the Different Destinations.

In its report the Commission approves certain rates from each origin group in Indiana and Illinois to each of twelve destinations in northern Illinois. These rates are stated in Appendix A to the report. (R. 213-216.) In Appendix D to the report (R. 220), appears a statement of the average of the approved rates to all twelve destinations in northern Illinois. In the body of the report the Commission discusses the relationship in the rates from the various groups on the basis of such averages. (Report, pp. 198 and 200; R. 187-190.) At page 201 of the report (R. 191) the Commission compares, by percentages of two mileage scales, the average of the rates from all Indiana groups and from all Illinois groups to all the twelve representative destinations and states that the Commission believes

the approved rates and rate bases shown in Appendices A and D will afford fair and reasonable relations of rates to the northern Illinois destinations, both as between the respective origin groups and as between the Indiana groups on the one hand and the Illinois groups on the other.

The order cancelling the suspended rates is without prejudice to publishing rates on the bases approved. That part of the order requiring the removal of undue preference and prejudice also involves the relationships reflected by the approved rates.

Nowhere in the report are there any statements of facts or reasons why the Commission deems the approved rate from any group to any destination in northern Illinois proper. Nowhere in the report is there any statement of any fact or any reason why the Commission deems the relationship between the approved rates from an Indiana group and an Illinois group to any destination proper. The establishment of too high a rate to Rockford and too low a rate to Polo, while on the average such rates may be reasonable, does not comply with the requirements of the Act. Each origin group and each destination is entitled to just, reasonable, non-discriminatory, non-preferential and non-prejudicial rates.

The Commission states no fact or reason for approving rates of $2.07 for the 251 mile average distance from the Brazil group to Rockford, and $1.95 for the 257 mile haul from the Springfield group to Rockford. (R. 216.) No reason is stated why the Commission considers it fair to approve a rate of $2.07 from the Brazil group to Belvidere, a distance of 258 miles, and a rate of $1.95 from the Springfield group for a distance of 279 miles. (R. 213.) No reason is given for approving a rate from the Brazil group to Rochelle of $1.89 for a distance of 255 miles (R. 215), and a rate of $2.07 to Rockford for a distance of 251

miles. (R. 216.) It is significant that to Rochelle the distance from the Springfield group is but 200 miles, and the approved rate of $1.75 is still 14 cents per ton less than the approved rate of $1.89 from the Brazil group.

The averaging of wholly inconsistent, unexplained, and arbitrarily approved rates to these northern Illinois destinations into the final desired relationship that by comparison appears fair and reasonable, *i. e.*, $1.95 for 256 miles from Brazil and $1.83 for 225 miles from Springfield, does not support or tend to support the propriety of any of the approved rates to particular destinations.

The relationships between the groups under the approved rates are as inconsistent and arbitrary as the rates themselves. This is illustrated by a comparison of the rates approved from the Brazil and Southern Illinois groups. At Rochelle, where Brazil has a 100 mile shorter distance than Southern Illinois, Brazil has a 16 cent lower rate; at Sterling, where Brazil has only a 42 mile shorter distance than Southern Illinois, Brazil also would have a 16 cent lower rate. (R. 215.) At Belvidere, where Brazil's distance is 170 miles less than from Southern Illinois, the approved rates from Brazil are 18 cents less than from Southern Illinois (R. 213); while at Forreston, where distance favors Brazil only by 83 miles, the approved rate is 25 cents per ton less than the rate approved from Southern Illinois. (R. 214.) If the averages shown in Appendix D are just and reasonable, *i.e.*, Southern Illinois 354 miles, approved rates $2.14, Brazil distance 256 miles, approved rates $1.95, a difference in average distance of 98 miles and a difference in average rates of 19 cents, then clearly differences of but 16 cents for 100 miles, and 18 cents for 170, 122 and 125 miles, are improper.

The foregoing are but a few of the many instances of the inconsistencies and arbitrariness in the approved rates to the various destinations.

We submit that the report is so lacking in findings of fact, evidence, or reasons for approving the hodgepodge of rates and rate relationships set forth in Appendix A, that part of the report and the part of the order permitting the carriers to publish the approved rates, and requiring changes in present rates that do not reflect the relationships created under the approved rates, should be enjoined and set aside.

VII.

The Commission Has No Authority Under the Act to Require the Milwaukee or Any Other Carrier to Charge Higher Rates Than Such Carrier Believes to Be Proper from Origins Served by It in the Brazil and Linton Groups Because Other Carriers Serving Other Origins in Those Groups Maintain Higher Rates.

We have heretofore shown under Points II and III, *supra*, that there are no findings of fact and no evidence of the existence of any facts with respect to the single-line rates of the Milwaukee which constitute a violation of Sections 2 or 3 (1) of the Act. There are no findings and no evidence that the single-line rates of the Milwaukee are not compensatory or are less than reasonable minimum rates. There is no evidence and no finding of any illegality in those rates.

A railroad has the right to initiate such rates as it believes proper so long as those rates do not violate any of the provisions of the Act. The case of *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, involved the legality of the single-line rates of the Milwaukee from origins on its line in the Brazil and Linton groups to Rockford and other points in northern Illinois. The Commission had entered an order requiring the cancellation of those rates, which order was enjoined

in the District Court. On appeal this Court said, at page 506:

> "There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 636; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. These tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best.'"

In its report and order in I. & S. Docket No. 5139 the Commission endeavored to bring the single-line rates of the Milwaukee and Illinois Central within the scope of the exception stated by this Court, *i. e.*, discrimination and preference. However, as we have shown under points II and III of this brief, there is no basis of fact in this record to sustain a conclusion that those single-line rates are either discriminatory or preferential. No condemnation of these single-line rates is predicated upon the basis that they are either so high or so low as to be unreasonable.

Findings Nos. 9 and 10 are to the effect that the coal rate adjustment cannot be stabilized upon a reasonable and non-prejudicial basis unless and until the maladjustments and inconsistencies inherent in any multiple basis of rates from the respective origin groups is eliminated and that the proposed rates would extend that maladjustment to Beloit and to the Princeton group. (R. 207-208.)

There is no evidence to support the foregoing findings.

There is no evidence that all rates from each group to each destination have in the past been the same; on the contrary the evidence shows that rates via the various carriers serving origins in a group now are not uniformly the same. (Exhibits Nos. 3 and 4; R. 1676-1678.) That situation is not peculiar to the Brazil and Linton groups.

The Act does not confer upon the Commission the power to require six or seven carriers serving origins in a certain wide area to charge the same rate from all such origins. To authorize the Commission to require each carrier serving origins in one of these so-called groups to charge the same rate, there would have to be evidence that such rate was just and reasonable for each such carrier from each such point. There is no such evidence in this record. As pointed out by the District Court in the prior decision involving these single-line rates of the Milwaukee, *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 8 F. Supp. 970, at page 974, referring to Section 15 a (2) of the Act:

> "As it stood in 1920, the Commission was authorized to initiate, modify, establish, or adjust rates so that carriers *as a whole* (or as a whole in each of such rate groups as the Commission might from time to time designate) would under honest, efficient, and economical management earn an annual net operating income equal as near as might be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. There is nothing in the section as it now stands authorizing the Commission to establish rates above a reasonable minimum for one railroad merely to enable another railroad in the group not so well situated, to earn a fair return, even if the act of 1920 did so provide. Nor is there any evidence in the record that the proposed rates of the Milwaukee if allowed to stand will so affect the earning capacity of any other railroad."

So in this record, there is no evidence that any more coal will move from the other origins in the Brazil and Linton groups if the Milwaukee rates are increased. The petition for rehearing filed by these appellants pointed out that if the propriety of the single-line rates of the Milwaukee as such were in issue, evidence could be introduced to show such rates did not injure other shippers in Indiana, and that the Milwaukee had always held itself ready to join with other carriers serving mines in those groups in the publication of rates on the same level as the single-line rates of the Milwaukee.

The attempt of the Commission to require all carriers serving origins in one of these so-called origin groups to charge the same rate to each destination is beyond its power. Each carrier is free to charge such rates as it deems desirable so long as such rates do not violate any of the provisions of the Act. In the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at page 636, it is stated:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 723-4; 168 U. S. 144, 172-3; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 564; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522."

The order of the Commission, and its assumed power to require the Milwaukee to charge the same rates as the other carriers serving origins in the Brazil and Linton groups, would deprive the carriers of this right to initiate and maintain rates within the zone of reasonableness.

VIII.

The Order of the Commission Is Arbitrary and Capricious Because Not Supported by Adequate and Suitable Findings of Fact or by Evidence, and the Report Affords No Rational Basis Therefor.

The report and order of the Commission are arbitrary and capricious in several particulars. The report and findings of fact contained therein wholly fail to afford a rational basis for the conclusions of the Commission or its order.

A. There Is No Basis in Law or in Fact to Justify the Conclusion of the Commission That Rates from All Origins in a Group Must Be Equal to Common Destinations.

The report of the Commission, Findings Nos. 4 and 6 (R. 206-207), condemns different rates from the same group or district via routes of different carriers. In this way it seeks to treat the carriers serving a district as a single unit or group. While under Section 15 a (2) of the Act, as amended by the Transportation Act of 1920, there might have been justification for the contention that such authority existed, the later amendments of that section in 1933 and 1940 have limited the authority of the Commission in this regard. *Chicago, M., St. P. & P. R. Co. v United States*, 8 Fed. Supp. 970, 974; *Florida* v. *United States*, 292 U. S. 1, 6, 7. There is now no basis in the law for treating the carriers serving any territory as a single unit.

There is nothing in the Act which requires the B. & O., for example, to charge the same rate from mines served by it in the Princeton group to Rockford, a haul of 476 miles, as is charged by the C. & E. I. from mines served by it in that group for a haul of 334 miles to Rockford. Nor is there any requirement of law that the Milwaukee must

charge the same rate as the Pennsylvania from Linton group origins to Freeport, where the Milwaukee haul is 313 miles and the Pennsylvania haul is 414 miles. These are but two of the numerous instances shown in the evidence where the distances via one carrier serving mines in the same group are 50 miles to more than 100 miles greater to the same destination than the distances via another carrier serving mines in the same group. (Ex. No. 28; R. 1686.)

The report is inconsistent in that it condemns the carriers for not charging the same rate from all origins in a group via all routes, where specific rates are published; but approves the situation where the carrier fails to publish specific rates from points on its line in a group to some destinations, while meeting competition by publication of rates to other destinations. The report in this respect would deprive the carriers of the privilege of publishing rates within the zone of reasonableness which this Court has consistently ruled is a right of the carriers. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, and cases cited therein.

Another illustration of the report treating the carriers as a single unit is Finding No. 13 (R. 208) and the approved rates from the Boonville and Princeton groups, merging the two groups on an equal rate because one mine in the Princeton group served by the New York Central is but 10 miles, across country, from a mine in the Boonville group served by the Southern. As we have pointed out in Part V, *supra*, pp. 69-72, the Southern is the only carrier serving mines in the Boonville group; those mines are located on a branch line running from Huntingburg, Indiana, to Evansville, Indiana. The Princeton group is served by the New York Central, C. & E. I., Southern, B. &. O. and the A. W. & W., a short line connecting with

the New York Central and Southern. The mines on the Southern in the Princeton group are on its main line from Louisville to St. Louis. The Southern must haul coal from Boonville mines over 45 miles farther than from the mines served by it in the Princeton group, but because the New York Central has a long haul from its Princeton mines the report would consolidate the two groups. As shown by Appendix D to the report, the Boonville mines on the average have a 34 mile longer haul than the Princeton mines to destinations in northern Illinois. (R. 220.) There is no basis in fact or in law for requiring the Southern to charge the same rate from Boonville as from its Princeton mines, or from the mines served by the New York Central in the Princeton group.

The report is inconsistent in requiring a parity of rates from the Boonville and Princeton groups, where the difference in distance is 34 miles, while requiring a difference of 10 cents per ton as between the Brazil and Linton groups where the average difference in distance is 36 miles. (R. 220.)

The report and order of the Commission are in this respect contrary to the law and should be enjoined.

B. The Report Fails to Disclose Any Logical or Rational Basis of Fact or Law for the Rates and Rate Relationships Approved in the Report and Is Therefore Arbitrary and Capricious.

Throughout the report, and in Finding No. 19 and Conclusions Nos. 1, 2, 3 and 6 therein, reference is made to the rates approved in the proceeding and set forth in Appendices A and D of the report. (R. 210-216, 220.)

Appendix A to the report shows approved rates to twelve destinations in Illinois and Beloit; six different rates are approved from the Brazil group, which is the base group in Indiana. The following rates are approved

for the following distances: $1.84 for 213 and 217 miles; $1.89 for 246, 255, 257 and 287 miles; $1.95 for 248 and 266 miles; $2.02 for 265 miles; $2.07 for 251, 258 and 287 miles; and $2.22 for 269 miles. (R. 213-216.)

No reason is given for approving a rate of $1.89 for transporting coal 257 miles to Dixon, while approving a rate of $2.07 for like transportation for 251 miles to Rockford and 258 miles to Belvidere. No reason appears in the report for approving a rate of $1.89 for a transportation service of 287 miles to Sterling and a rate of $2.07 for like service to Freeport. For transportation services involving average hauls of 265, 266 and 269 miles, the Commission has approved rates of $2.02, $1.95 and $2.22, respectively, and has stated those are all reasonable, non-prejudicial and non-preferential rates.

No reasons are given to sustain that statement. The grossly inconsistent rates are approved without any consideration of the facts pertaining to the service from the Brazil group to any of the destinations. The only matter considered was the average of these arbitrary and inconsistent rates to all of the twelve destinations from each group in Indiana, which we discuss under Part VI of this argument, *supra*, pp. 72-75.

If those average rates are reasonable, then the rates from the individual groups are unreasonable. For example, Appendix D shows the average distance from the Brazil group to the twelve destinations to be 256 miles, and the average approved rate to be $1.95. This shows that the approved rate of $2.07 from Brazil to Rockford, 251 miles, is unreasonable. It also shows that the $1.89 rate from Brazil to Dixon for 257 miles is improper. Since the approved rates from the Linton and Princeton groups are on the basis of the standard differentials over the Brazil group rates, those other rates reflect the same arbi-

trary disregard of distance and service as do the approved rates from the Brazil group.

Another comparison shows that the approved rates are arbitrary and capricious. The Commission has found (Finding No. 8; R. 207) that the transportation conditions in Illinois and from Indiana to these northern Illinois destinations are sufficiently similar to require the same rate basis from the groups in both States. Notwithstanding that finding, the approved rates from Indiana to the important destinations are much higher than from Illinois for like distances. From the Springfield group to Rockford the distance is 257 miles, approved rate $1.95; from the Brazil group the distance is 251 miles, approved rate $2.07. (R. 216.) To Belvidere, the distance from the Springfield group is 279 miles, the approved rate $1.95; from the Brazil group the distance is 258 miles, approved rate $2.07—a 12 cent higher rate for a 21 mile shorter haul. (R. 213.) To DeKalb, the distance from the Springfield group is 210 miles, the approved rate $1.75; from the Brazil group, the distance is 213 miles, the approved rate $1.84—here Indiana is charged 9 cents more for a 3 mile longer haul, while to Geneva, where the distance from Springfield is 230 miles and from Brazil 217 miles, the approved Springfield rate is $1.75 and the approved Brazil rate $1.84, Indiana is charged 9 cents per ton more for a 13 mile shorter haul. (R. 213, 214.) To Beloit, the average distance from the Springfield group is 276 miles, from the Brazil group the average distance is 269 miles, but the Springfield approved rate of $2.10 remains in effect, and the Commission approves a rate from Brazil of $2.22, or 12 cents more per ton from Brazil for a 9 mile shorter haul than from Springfield. (R. 216.)

True the Commission says that the Springfield rate is 30 cents less than the Southern Illinois rate to all destinations in southern Wisconsin, but the evidence shows

that the Brazil rates are also 30 cents less than the Southern Illinois rates to all destinations in southern Wisconsin (R. 1068), and that the Commission approved that relationship between Southern Illinois and Brazil as fair and reasonable to all concerned in the case of *Illinois Coal Traffic Bureau* v. *Ahnapee & W. Ry. Co.*, 204 I. C. C. 225.

The arbitrary character of the approved rates from Indiana, by comparison with the approved rates from Illinois groups, could be shown by innumerable comparisons. In the case of the Princeton and Belleville groups, the Princeton distance to Belvidere is 364 miles, rate $2.24; Belleville distance 395 miles, rate $2.15. (R. 213.) From Belleville to DeKalb the distance is 314 miles, approved rate $1.95, with Linton to DeKalb 257 miles, approved rate $1.94. Indiana is accorded a one cent lower rate for a 57 mile shorter haul. (R. 213.) To Geneva, the Belleville group approved rate is $1.95 for a distance of 353 miles, while the Princeton approved rate is $2.01 for a distance of 313 miles. The Indiana rate is 6 cents per ton more for a 40 mile shorter haul than from the Illinois group. (R. 214.) We believe the foregoing examples clearly show that the approved rates are arbitrary and capricious.

The relationships between the approved rates from Indiana and those from Illinois groups are wholly arbitrary. The rates from Indiana for many years have been constructed in relation to the rates from Southern Illinois. The rate from Southern Illinois was fixed and the rate from the Brazil group in Indiana established at, in this general territory, 30 cents per ton under the Southern Illinois rate; this was done in all the general percentage increases and decreases in rates since 1910. (R. 1067-1068.)

In the rates approved no fixed relationship as between the Southern Illinois group and the Brazil group is main-

tained. As between the Southern Illinois group and the Brazil group there are differences of 16, 18, 21 and 25 cents per ton in the approved rates. There is no relation between the difference in rates and the difference in distance. (R. 213-216.) To Belvidere, the distance difference is 170 miles, the approved rate difference is 18 cents (R. 213); to Forreston, the difference in distance is 83 miles, but the rate difference is 25 cents (R. 214); while at Rochelle, the rate difference is only 16 cents for a difference in distance of 100 miles. (R. 215.) Under the approved rates 16 cent differences in rates of the Brazil and Southern Illinois groups apply to differences in distance of 42, 55, 67 and 100 miles; 18 cent rate differences apply to differences in distance of 70, 80, 84, 122 and 125 miles; 21 cent differences in rates apply to differences in distance of 125 and 165 miles; and 25 cent rate differences apply to 83 and 115 mile distance differences. (R. 213-216.) No facts or reasons are given for these inconsistent and arbitrary differences.

As between the Southern Illinois group and the Springfield group, the rate difference is uniformly 30 cents per ton—the difference in distance varies from 92 miles to 155 miles. (R. 213-216.) If 30 cents is reasonable and proper as between Southern Illinois and Springfield, for a difference in distance of 106 miles, why is 18 cents proper as between Southern Illinois and Brazil where the difference in distance is 112 miles? If 30 cents is proper for 92 miles as between Southern Illinois and Springfield at Freeport (R. 214), why is 16 cents proper for a difference of 100 miles as between Southern Illinois and Brazil at Rochelle? (R. 215.) The report of the Commission fails to give any explanation for these extraordinary situations.

Byron and Forreston, where Brazil has the most favorable differentials, have populations of 1,113 and 922,

respectively. Polo, where Brazil is accorded a difference in rates of 18 cents for a more favorable distance of 84 miles, has a population of 2,071. Rockford has a population of 84,000, but there Brazil has an approved rate difference of only 18 cents, where distance favors it by 112 miles under Southern Illinois. At Belvidere, population 8,000, the Southern Illinois rate is but 18 cents more than Brazil, though the Southern Illinois distance is 170 miles greater than from Brazil. At Geneva, population 4,000, and DeKalb, population 9,000, the Southern Illinois approved rate is but 21 cents more than from Brazil, though the distance favors Brazil by 125 and 165 miles, respectively. (Ex. No. 117; R. 1700.)

The result of approving a high level of rates from Indiana to Rockford, Freeport, DeKalb, Geneva, and Belvidere, and a much lower level to Amboy, Byron, Forreston, Polo, Rochelle and Sterling, is that when those rates are averaged they appear to be comparable with the average from Illinois. We submit; however, that each destination is entitled to a reasonable rate. It may be noted that the population of the cities first named where the Indiana approved rates are relatively high totals 139,015, while the population of those cities to which the Indiana rates are relatively lower totals only 10,362. (Ex. No. 117; R. 1700.) It should also be noted that to each destination the Springfield group rate is lower than the Brazil group rate.

In this connection we call the Court's attention to its decision in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, where it said at page 637:

> "While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a

locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful, and obviously, *what the carrier may not lawfully do, the Commission may not compel.*" (Emphasis supplied.)

C. The Report Fails to Disclose Any Logical or Rational Basis of Fact or Law for the Rates and Rate Relationships Approved to Beloit, and Its Approval of Rates to Beloit Is Arbitrary and Capricious.

The report approves rates from all groups in Indiana and Illinois to Beloit. (R. 220.). The report condemns the proposed rates to Beloit because there would be different rates from origins on the Milwaukee via its single line than from other origins in the Brazil and Linton groups, and different rates from origins on the Southern and origins on the A. W. & W. moving via the Southern, in the Princeton group, than would apply under the proposed rates from other origins in the Princeton group. (R. 205, 207, 211.)

Neither the Milwaukee, via its single line, nor the Southern published any new rates from origins served by them in the Brazil and Linton groups or the Princeton group, respectively. Their present rates were not changed to Beloit. Those rates were not before the Commission in this proceeding. The Commission so states in its report, page 202. (R. 192.) Notwithstanding the fact that the so-called dual basis of rates to Beloit is the result of action by carriers other than the Milwaukee and Southern, the Commission condemns the Milwaukee and Southern for not following the lead of the other carriers serving Indiana, and concludes that the proposed rates published by carriers over whom those two carriers

have no control result in a violation by the Milwaukee and the Southern of Sections 2 and 3 (1) of the Act.

This we submit is arbitrary and capricious action which should be corrected by this Court.

The Commission's attempted justification of the approved rates and relationships to Beloit appears at pages 202 to 204 of the report. (R. 192-195.) The approved rates from the various origin groups appear in Appendix D of the report (R. 220), where the distances and rates from the principal groups to Beloit appear as follows:

Group	*Distance*	*Approved Rate*
Brazil	269	$2.22
Springfield	276	2.10
Linton	302	2.32
Belleville	358	2.30
Princeton	379	2.39
Southern Illinois	394	2.40

It will be noted that in each instance the rates from the Illinois groups are on a substantially lower level than from the Indiana groups, notwithstanding the Commission's finding that rates from both States should be on the same level. (R. 207.)

In connection with the distances shown above from the Belleville and Centralia groups in Illinois, the only evidence of shortest tariff route distance from those groups (Ex. No. 28; R. 1686) shows those distances as 383 miles from Belleville and 331 miles from Centralia—whereas Appendix D to the report shows but 358 and 283 miles, respectively, from those groups. The short tariff route distances from those groups shown in Exhibit No. 42 (R. 1688) are 389.8 and 321.9 miles, respectively, and in Exhibit No. 3, Part V, pages 37 and 38 (R. 1676), are 357.8 miles and 343.4 miles, respectively.

No reason is stated to sustain a rate from Brazil 12

cents per ton higher than from Springfield for substantially the same distance. No reason is stated for approving a rate from Linton 2 cents per ton higher than from Belleville where the Linton distance is stated to be 56 miles shorter, but which the evidence shows to be 81 miles shorter. No reason is given for approving a rate from Princeton only one cent less than from Southern Illinois when the distance from Princeton is 25 miles shorter than from Southern Illinois. (R. 220.)

While this Court has ruled that inconsistency between two decisions of the Commission could not be relied upon, it has never sustained a report and order where the same report is wholly inconsistent in its reasoning and results.

We submit that the approved rates to Beloit are arbitrary and capricious and the order, so far as it would require maintenance of rates on those relationships or permits the publication of such rates, should be enjoined.

D. The Report and Order Are Arbitrary and Capricious in That the Approved Rates Would Insure Illinois Operators a Practical Monopoly in the Beloit and Northern Illinois Markets.

The Illinois operators introduced evidence that since 1923 they have lost substantially in the markets in Iowa, Wisconsin, Minnesota and states farther west and in Indiana, and that the northern Illinois market is now more important to them than formerly. (R. 1504-1511.) The only evidence of shipments of coal to destinations in northern Illinois and Beloit is contained in Exhibit No. 4, Part VIII (R. 1677), which shows shipments from each group to each of seven Illinois destinations and Beloit for 1941 and the first six months of 1942, and Exhibit No. 99 (R. 1697) which shows shipments to the same points from all of Illinois and all of Indiana for 1936 and 1941.

Other exhibits dealing with production and shipments were total shipments to Chicago, shipments to Indiana,

and shipments to various states. (Exs. Nos. 100 and 101; R. 1697.) These latter shipments have no bearing on any issue in this case, but the Commission apparently deems them important to the decision of this case. See Report, pages 197 and 198. (R. 185, 186.) What bearing the fact that Illinois shipments to Indiana declined 12.5 per cent from 1936 to 1941, while Indiana shipments to Indiana increased in that period, has on the rates to Rockford, Illinois, does not appear, but the Commission has apparently been swayed by that fact in reaching its conclusions in this case.

Exclusive of Rockford, where all Indiana coal was practically barred by reason of the intrastate reduction in rates in 1930, and where no competitive Indiana rates were assured until the decision of this Court in March of 1935 in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, Exhibit No. 99 shows that in 1936 Indiana shipped 70,000 tons of coal to the other six Illinois points and 51,000 tons to Rockford; while in 1941 it shipped 57,000 tons to the other six points and 211,500 tons to Rockford. In 1936, Illinois shipped 338,800 tons to the other six points and 208,000 tons to Rockford, and in 1941 it shipped 292,700 tons to the six points and 276,000 tons to Rockford. (Ex. No. 99; R. 1697.)

Bearing in mind that the principal Indiana groups are nearer this market territory than the principal Illinois groups (R. 486A), it is clear that Illinois does not require any help from the Commission when it does and has shipped approximately 5 tons of coal to this territory, exclusive of Rockford, for every ton shipped by Indiana to all these destinations other than Rockford.

The report and order of the Commission is in direct conflict with the law as stated in the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 637, from

which we quote, *supra*, p. 87, to the effect that carriers may not publish a rate for the purpose of destroying a market or diverting traffic from a particular place to the injury thereof or to help another place, and "what the carriers may not lawfully do, the Commission may not compel."

The Commission relies in its report, page 194, on the statement by the carriers that the proposed and suspended rates will not result in the diversion of any traffic from one group to another. (R. 182.) However, the carriers' proposed rates to maintain the same relationship between the Milwaukee and Illinois Central single-line rates to Rockford and other destinations as had existed for several years, while the approved rates and the order requiring the Milwaukee and the Illinois Central to increase their single-line rates will directly affect over 78 per cent of the Linton tonnage and over 95 per cent of the Brazil tonnage to Rockford. These shipments exceeded all shipments from Indiana to the involved territory.

Certainly the Commission is not giving effect to the principle stated on page 204 of its report, that "we have kept in mind the importance to consumers, coal operators, and railroads * * * so as to afford all concerned a fair opportunity to compete in the purchase, sale and transportation of coal from Illinois and Indiana to these destinations." (R. 194.) If the Commission had kept those factors in mind it would not (1) require an increase in the rates of the Milwaukee and Illinois Central to a basis higher than rates for similar distances and service from Illinois mines, (2) deprive consumers of the benefits of the single-line rates of the Milwaukee and the Illinois Central, (3) deprive the Milwaukee of an opportunity to transport coal from mines on its line and divert

that traffic to lines serving Illinois mines, and (4) deprive Indiana operators of an opportunity to compete on the same level of rates with Illinois operators seeking business at Rockford, Freeport, Geneva, DeKalb and Beloit, for example.

Conclusion.

The Commission erred in its report and order in this proceeding, and the District Court erred in failing to enjoin and set aside the report and order of the Commission.

The District Court apparently acted upon a misapprehension of the facts and issues. In its Finding No. 5, the District Court says the Commission entered its order in both Docket No. 28881 and I. & S. Docket No. 5139 on July 9, 1945. This is incorrect. The Commission's order of July 9, 1945, is in I. & S. Docket No. 5139 alone. (R. 222.) The Court's Finding No. 6 states that the Commission in its order "prescribed interstate and intrastate rates to be published and collected by the carriers" pursuant to its authority under Section 15. This is incorrect. The Commission in its order of July 9, 1945, did not prescribe any rates—it ordered the removal of violations of Sections 2 and 3 (1) of the Act. It had no power to prescribe intrastate rates, except as provided in Section 13 (4) of the Act.

Conclusions of Law of the District Court, Nos. 2 to 6, inclusive, are, we submit, erroneous for the reasons hereinabove stated.

We, therefore, respectfully urge that the judgment and decree of the District Court be reversed, and this cause be remanded to said Court with instructions to enter a decree enjoining the order of the Commission dated July 9, 1945, except the part thereof requiring the cancellation of the new rates, and enjoining and setting aside the report of

the Commission in so far as it purports to approve rates from origins and groups in Indiana and Illinois to Rockford and other destinations in northern Illinois and Beloit, Wisconsin.

Respectfully submitted,

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March, 1947.

APPENDIX.

The Urgent Deficiencies Act of 1913, U. S. Code, Title 28, Section 47, provides:

"*Sec. 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the peti-

tioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

The Interstate Commerce Act, as amended, U. S. Code, Title 49, Sections 2, 3(1), 13(1), 13(4), 15(1) and 15(7), provides in part:

"Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"Sec. 13. (1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

* * * * *

"Sec. 13. (4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

"Sec. 15. (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares,

or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

"Sec. 15. (7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper

in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."